(20)

No. 90-26-CFX
Status: GRANTED

Title: Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana, et al., Petitioners
v.
Glen Theatre, Inc., et al.

Docketed:
July 2, 1990

Court: United States Court of Appeals for the Seventh Circuit

Counsel for petitioner: Uhl,Wayne E.

Counsel for respondent: Rosenfeld,Robert C., Baude,Patrick Louis, Klein,Lee J.

Entry	Date	Note	Proceedings and Orders
1	Jul 2 1990	G	Petition for writ of certiorari filed.
2	Jul 2 1990		Appendix of petitioner filed.
3	Jul 27 1990		Brief of respondents Glen Theatre, Inc., et al. in opposition filed.
5	Jul 30 1990		Brief of respondents Darlene Miller, et al. in opposition filed.
6	Jul 31 1990		Brief amicus curiae of American Family Association, Inc. filed.
4	Aug 1 1990		DISTRIBUTED. September 24, 1990
7	Aug 1 1990	X	Brief amici curiae of Arizona, et al. filed.
8	Aug 27 1990	X	Supplemental brief of respondents Glen Theatre, Inc., et al. filed.
9	Oct 1 1990		Petition GRANTED.
			**********
10	Nov 7 1990		Record filed.
		*	Certified copy of original record and C. A. Proceedings received.
11	Nov 13 1990		Record filed.
		*	Certified copy of original record received.
12	Nov 15 1990		Brief amici curiae of American Family Association, Inc., et al. filed.
13	Nov 15 1990		Brief amici curiae of National Governors' Association, et al. filed.
14	Nov 15 1990		Joint appendix filed.
15	Nov 15 1990		Brief of petitioners Michael Barnes, Prosecuting Attorney, etc., et al. filed.
18	Nov 15 1990		Brief amici curiae of Arizona, et al. filed.
16	Nov 23 1990		SET FOR ARGUMENT TUESDAY, JANUARY 8, 1991. (3RD CASE)
17	Nov 27 1990		CIRCULATED.
19	Dec 3 1990	N	Motion of respondents Glen Theatre, Inc., et al. for divided argument and for additional time for oral argument filed.
20	Dec 3 1990	N	Motion of respondents Darlene Miller, et al. for divided argument filed.
21	Dec 6 1990	G	Application (A90-437) to extend the time to file a reply brief from January 1, 1991 to January 7, 1991, submitted to Justice Stevens.
27	Dec 6 1990		Response by petitioners to motions filed by respondents for divided argument and for additional time for oral argument.

2 pp

No. 90-26-CFX

Entry	Date	Note	Proceedings and Orders
22	Dec 7 1990		Application (A90-437) granted by Justice Stevens extending the time to file until January 4, 1991.
23	Dec 14 1990	X	Brief amicus curiae of Georgia On Premise & Lounge Association, Inc. filed.
25	Dec 14 1990	X	Brief amici curiae of ACLU, et al. filed.
30	Dec 14 1990	G	Motion of James J. Clancy for leave to file a brief as amicus curiae filed.
24	Dec 17 1990	X	Brief of respondents Darlene Miller, et al. filed.
26	Dec 17 1990	X	Brief amici curiae of People For The American Way, et al. filed.
28	Dec 19 1990	X	Brief of respondents Glen Theatre, Inc., et al. filed.
29	Dec 26 1990		Lodging received.
32	Jan 3 1991	X	Reply brief of petitioners Michael Barnes, Prosecuting Attorney, etc., et al. filed.
31	Jan 7 1991		Motion of James J. Clancy for leave to file a brief as amicus curiae GRANTED.
33	Jan 8 1991		ARGUED.

90-26

Supreme Court, U.S.
FILED
JUL 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. ____

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

LINLEY E. PEARSON
Attorney General of Indiana

WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

219 State House
Indianapolis, Indiana 46204
(317) 232-6333

Counsel for Petitioners

June 29, 1990

Graphics Ltd., Indianapolis, IN 46202

QUESTIONS PRESENTED

1. Whether nude barroom-style dancing is to be granted per se protection as "speech" under the First Amendment?

2. If nude dancing which is not obscene is protected "speech," whether Indiana's general public indecency law, Ind. Code § 35-45-4-1, is unconstitutional as applied to such dancing?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Court of Appeals for the Seventh Circuit; the petitioners in this Court are italicized, all others are respondents:

NO. 88-3006

Plaintiffs-Appellants: Darlene Miller; JR's Kitty Kat Lounge, Inc.

Defendants-Appellees: Civil City of South Bend, Indiana; *Indiana Alcoholic Beverage Commission;* Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

No. 88-3244

Plaintiffs-Appellants: Glen Theatre, Inc.; Gayle Ann Marie Sutro; Carla Johnson.

Defendants-Appellees: Civil City of South Bend, Indiana; Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

TABLE OF CONTENTS

	Page
Questions Presented	i
List of Parties	ii
Opinions Below	2
Jurisdiction	2
Constitutional Provision and State Statute Involved	2
Statement of the Case	3
Reasons for Granting the Writ:	
I. WHETHER NUDE BARROOM DANCING IS "SPEECH" PROTECTED BY THE FIRST AMENDMENT, OR IS REGULABLE BY A GENERAL PUBLIC INDECENCY STATUTE, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT	8
A. The status of nude dancing under the First Amendment has not been resolved by this Court.	8
B. The Seventh Circuit's novel holding that all non-obscene nude dancing is "speech," and cannot be proscribed by a content-neutral public indecency law, potentially invalidates indecency or nudity statutes in many states	10
C. This case is an appropriate vehicle for deciding the questions presented	13
II. THE SEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT	14
Conclusion	17
Appendix	(Separate Volume)

TABLE OF AUTHORITIES

Cases: *Page:*

Ardery v. State, 56 Ind. 328 (Ind. 1877) 12

California v. LaRue, 409 U.S. 109 (1972) 8, 13

City Court of City of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972) 12

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986) 10, 13

City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111, *cert. denied* 396 U.S. 901 (1969) 15

Clark v. Indiana, 446 U.S. 931 (1980) 5

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 9

Dove v. Indiana, 449 U.S. 806 (1980) 5

Erhardt v. State, 468 N.E.2d 224 (Ind. 1984) 5

FW/PBS, Inc. v. City of Dallas, 493 U.S. ___, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) 10

Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980) 15

Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988) ..... *passim*

Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986) 6, 8

Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir.), *cert denied* 459 U.S. 859 (1982) 8

Hoffman v. Carson, 250 So.2d 891 (Fla.), *appeal dismissed* 404 U.S. 981 (1971) 15

International Food & Beverage Systems v. City of Ft. Lauderdale, 794 F.2d 1520 (11th Cir. 1986) 8

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) ... 11

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) 8

Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972) 15

Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989) 7

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 10, 13

Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952) 12

People v. Wilson, 95 Mich. App. 440, 291 N.W.2d 73, *leave to appeal denied* 409 Mich. 925 (1980). 16

Robinson v. State, 253 Ark. 882, 489 S.W.2d 503 (1973). 15

Sable Communications v. FCC, 492 U.S. ___, 109 S.Ct. 2829, 106 L.Ed.2d 93 (1989) 10

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) . 9, 10

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 11

Spence v. Washington, 418 U.S. 405 (1974) 11

State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980) 4, 5, 14

State v. Jacobson, 459 So.2d 1285 (La. App. 1984), *writ denied id.* (La. 1985). 16

State v. Walters, 440 So.2d 115 (La. 1983) 16

Texas v. Johnson, 491 U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342(1989) 11

United States v. O'Brien, 391 U.S. 367 (1968) 11

Young v. Arkansas, 474 U.S. 1070 (1986) 10, 14

Young v. State, 286 Ark. 413, 692 S.W.2d 752 (1985) ... 14

Ward v. Rock Against Racism, 491 U.S. ___, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 11

Constitutional Provisions, Statutes, and Rules:

U.S. Const, amend. I ..... *passim*

U.S. Const., amend. XXI 8, 13

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1343(a)(3) 2

28 U.S.C. § 2002 2

U.S. Sup. Ct. R. 10.1(a) 16

U.S. Sup. Ct. R. 10.1(c) 14

Ind. Code § 35-45-4-1 ..... *passim*

Selected Public Indecency Laws of Other States (list) .. 13

Other Authorities:

67 C.J.S. *Obscenity* §§ 10-11 (1978) 12

3 *Wharton's Criminal Law* §§ 317-318 (C. Torcia 14th ed. 1980) 12

No. ____

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners respectfully petition this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, sitting en banc, entered in *Darlene Miller, et al. v. Civil City of South Bend, et al.*, Nos. 88-3006 & 88-3244, on May 24, 1990. The judgment reversed the United States District Court for the Northern District of Indiana, and enjoined the petitioners from enforcing Indiana's public indecency statute against the respondents

based on their presentation and performance of nonobscene nude dancing.

OPINIONS BELOW

The divided en banc decision of the Seventh Circuit of May 24, 1990 has not yet been reported. The majority opinion and dissents thereto are reprinted in the Appendix at page 1. The vacated panel decision of the Seventh Circuit of October 19, 1989 is reported at 887 F.2d 826, and is reprinted in the Appendix at page 112.

The decision of the district court of September 9, 1988, on remand from the first appeal, is reported at 695 F.Supp. 414, and is reprinted in the Appendix at page 120.

The first decision of the Seventh Circuit of September 30, 1986 is reported at 802 F.2d 287, and is reprinted in the Appendix at page 140.

The original decision of the district court granting a preliminary injunction on July 26, 1985, and its order making the injunction permanent on October 10, 1985, are not reported, and are reprinted in the Appendix beginning at page 148.

JURISDICTION

The judgment to be reviewed was entered on May 24, 1990. No petition to rehear the judgment was filed.

An earlier judgment, entered by a panel of the court of appeals on October 19, 1989, was vacated by an order granting rehearing en banc on January 9, 1990 (App. 110-111).

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The statute under review in this case, Ind. Code § 35-45-4-1, provides in pertinent part:

> (a) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
>
> (2) engages in deviate sexual conduct;
>
> (3) appears in a state of nudity; or
>
> (4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

STATEMENT OF THE CASE

Facts

The district court described the dancing of one of the respondents as follows:

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing." The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go," sometimes fast, sometimes slow. She

> dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest.

695 F.Supp. at 420 (App. 133).

Respondent Glen Theatre, Inc. runs a business called the "Chippewa Bookstore" offering, among other things, booths with glass panels through which paying adults can view nude women dancing on a stage. No alcoholic beverages are sold or permitted in the "bookstore." According to an affidavit of respondent Gayle Sutro, her nude dances "are appropriately choreographed and are an attempt to communicate as well as entertain." 695 F.Supp. at 420 (App. 131-132).

A videotape of the nude dancing was submitted to the district court, which described it as follows:

> The tape consists of four separate performances. The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts.

695 F.Supp. at 416 (App. 124). Based on this evidence, the district court found that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States," and that the dances are "mere conduct." *Id.* at 419 (App. 130).

There was no dispute that the defendant law enforcement officials had arrested and prosecuted dancers for violations of Indiana's public indecency statute, Ind. Code § 35-45-4-1, and would do so in the future. The Indiana Supreme Court had previously upheld the statute against a First Amendment challenge, *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931

(1980), and *Dove v. Indiana*, 449 U.S. 806 (1980); and had affirmed convictions thereunder, *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

In *Baysinger*, the Indiana Supreme Court construed Ind. Code § 35-45-4-1 to proscribe only conduct "traditionally . . . held to be public indecency," and not nudity "as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. Thus construed, the court found that the statute was not overbroad, and further that the nude barroom dancing at issue in the case was mere conduct without the expression of ideas. This Court dismissed appeals from this ruling for want of a substantial federal question. *Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980).

Proceedings Below

This litigation began with three separate actions under 28 U.S.C. § 1343(a)(3) (original action to redress deprivation of civil rights) and § 2202 (declaratory judgment) filed in the district court in 1985. Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson (the "*Glen Theatre*" plaintiffs) sued the City of South Bend, the city police chief, the county prosecutor, and the state attorney general. Darlene Miller and JR's Kitty Kat Lounge, Inc. (the "*Miller*" plaintiffs) sued the above officials and the Indiana Alcoholic Beverage Commission, as did Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") (the "*Diamond*" plaintiffs).

The plaintiffs sought injunctive relief prohibiting the defendants from enforcing § 35-45-4-1 against them on the basis of nude dancing they wished to perform. They claimed that enforcement of the statute, requiring them to wear "pasties" and "g-strings" while dancing, would violate their right to freedom of speech under the First Amendment.

In *Glen Theatre*, the district court found the public indecency statute to be facially unconstitutional for overbreadth,

and granted a preliminary injunction which was made permanent on October 10, 1985. (App. 148 *et seq.*) The Seventh Circuit reversed, finding that this Court's dismissal of the *Baysinger* appeals for want of a substantial federal question constituted an affirmance of *Baysinger's* holding that the statute was not overbroad. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-290 (7th Cir. 1986) (App. 142-146). The case was remanded to the district court for the plaintiffs to pursue their argument that the statute violated the First Amendment as applied to their nude dancing. *Id.* at 290 (App. 146). The district court was instructed to "examine the plaintiffs' proffered evidence of the dancing they wish to perform" and decide whether "the activity should be afforded First Amendment protection." *Id.* at 291 (App. 147).

On remand *Glen Theatre* was consolidated with the *Miller* and *Diamond* cases (in which preliminary injunctions had been denied). A videotape of four nude dances was submitted as evidence of the dancing the plaintiffs wished to perform. After reviewing the tape and relying on the factual findings previously made, the district court concluded that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States." Judgment was entered in favor of the defendants in all three cases. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 419 (N.D. Ind. 1988) (App. 130).[1]

Appeals were taken by the *Glen Theatre* and *Miller* plaintiffs. A panel of the Seventh Circuit[2] reversed the district court on October 19, 1989, ignoring the finding the district court was instructed to make on remand, and instead holding as a matter of law that all nonobscene nude dancing performed for entertainment is "expression" protected by the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989) (App. 112).

[1] The district court originally found the action to be moot as to the *Glen Theatre* plaintiffs, based on information that their business had been destroyed by fire. 695 F.Supp. at 416 (App. 124). Pursuant to a post-judgment motion, however, the court found that the case was not moot, and made the judgment effective as to the *Glen Theatre* plaintiffs as well. (App. 136-139.)

[2] The opinion was authored by Judge Flaum and joined by Judges Wood and Coffey.

The petitioners petitioned for rehearing en banc, and the Seventh Circuit granted rehearing en banc and vacated the panel decision on January 8, 1990. (App. 110-111.) On rehearing, by a vote of seven to four,[3] the Seventh Circuit again reversed the district court, and enjoined the defendant officials from enforcing the public indecency statute against the plaintiff businesses and dancers. (App. 1 *et seq.*)

The majority, acknowledging that this Court has not been directly presented with the issue, held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." (App. 8 & n. 3.) The majority found that the plaintiffs' nude dancing communicated an "emotional" theme of "eroticism and sensuality" (App. 11), and that the district court's finding of no expression in the dances was clearly erroneous (App. 11 n. 5). Finally, the majority concluded that Indiana's "laudable concerns" in prohibiting public nude dancing were insufficient to justify a restriction on the expression involved therein, but that Indiana could regulate the presentation of nude dancing by imposing reasonable time, place, and manner restrictions. (App. 14-16.)

[3] The majority opinion was authored by Judge Flaum. Judges Coffey, Easterbrook, Manion, and Kanne dissented in three separate opinions. (App. 48, 78, 101.)

REASONS FOR GRANTING THE WRIT

I. WHETHER NUDE BARROOM DANCING IS "SPEECH" PROTECTED BY THE FIRST AMENDMENT, OR IS REGULABLE BY A GENERAL PUBLIC INDECENCY STATUTE, ARE IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT.

A. The status of nude dancing under the First Amendment has not been resolved by this Court.

Lacking a clear resolution of the issue by this Court, lower courts such as the Seventh Circuit in this case are left to try to "envision what the Supreme Court would hold if directly presented with the issue." (App. 8 n. 3; see also App. 93-96, Easterbrook, J. dissenting.) In *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 947 (11th Cir.), *cert. denied* 459 U.S. 859 (1982), the court avoided the need to "gamble" on how a majority of this Court would rule. See also *International Food & Beverage Systems v. City of Ft. Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (taking it "for granted" that nude dancing is protected); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 & n. 4 (11th Cir. 1985) (noting that issue is undecided, and basing decision on "potential" for infringement on protected expression); *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 289-291 (7th Cir. 1986) (App. 145-146).

A review of this Court's decisions shows that the status of nonobscene nude dancing under the First Amendment has not been settled. In *California v. LaRue*, 409 U.S. 109 (1972), the Court reviewed regulations of sexual conduct in nightclubs and bars that went far beyond simple nude dancing, and also included the showing of films. *Id.* at 111. In upholding the regulations as within the States' police powers under the Twenty-first Amendment, the Court noted that "at least some of the performances . . . are within the limits of the constitutional protection of freedom of expression," *id.* at 118. But the Court did not specify which performances were protected; such a holding was unnecessary given the disposition of the case.

The case of *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975), was limited to whether the district court had abused its discretion in preliminarily enjoining enforcement of a local ordinance which prohibited waitresses, barmaids, and entertainers to appear with uncovered breasts. While most of the opinion discussed the issue of abstention, the Court discussed the plaintiffs' likelihood of success on the merits with the following qualified comment:

> Although the customary "bar room" type of nude dancing *may* involve only the barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment *might* be entitled to First and Fourteenth Amendment protection *under some circumstances*. In *LaRue*, however, we concluded that the broad powers of the States to regulate the sale of liquor, conferred by the Twenty-first Amendment, outweighed any First Amendment interest in nude dancing and that a state could therefore ban such dancing as a part of its liquor license program.

422 U.S. at 932-933 (emphases supplied). Without deciding the point, the Court agreed with the district court's concern that the ordinance was overbroad as possibly including a theatre, opera house, or ballet production.

The decision in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), is often cited for the proposition that nude dancing is protected by the First Amendment. However, the zoning ordinance at issue in *Schad* banned *all* live entertainment. The Court noted that "live entertainment, such as musical and dramatic works," is protected by the First Amendment, *id.* at 65, and that nude dancing is "not without its First Amendment protections from official regulation," *id.* at 66. But again clarification was unnecessary:

> Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the

> Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment.

452 U.S. at 66 (footnote omitted). Given the broad scope of the ordinance, the Court struck it down as being overbroad and inadequately supported by a substantial government interest.

In three cases decided after *Schad*, dissenting Justices (including the author of the *Schad* decision, Justice White) have urged that the nude dancing issue be addressed. *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-719, 723 (1981) (Stevens, J. dissenting); *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J. joined by Brennan, J. dissenting from denial of certiorari); see *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 97-103 (1986) (Stevens, J. joined by Brennan, J. dissenting).

Contrary to the suggestion of the Seventh Circuit majority (App. 7), this Court's ruling that indecent "dial-a-porn" recordings are protected sexual expression in *Sable Communications v. FCC*, 492 U.S. ___, ___, 109 S.Ct. 2829, 2836, 106 L.Ed.2d 93, 105 (1989), did not amount to a holding that nonexpressive nude dancing is protected as well. Neither did the plurality's citation to *Schad* in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. ___, ___, 110 S.Ct. 596, 604, 107 L.Ed.2d 603, 617 (1990), resolve the issue, where the plurality was simply noting that the City of Dallas had conceded First Amendment protection of at least some of the broad range of "sexually explicit speech" targeted by its ordinance. The reference to *Schad* merely pointed out the probable basis for the City's concession.

B. The Seventh Circuit's novel holding that all non-obscene nude dancing is "speech," and cannot be proscribed by a content-neutral public indecency law, potentially invalidates indecency or nudity statutes in many states.

After holding that nude dancing (as distinguished from dancing with "pasties" and a "g-string") is "speech," the Seventh

Circuit majority held that Indiana's only restriction on public nudity, Ind. Code § 35-45-4-1, is not a valid restriction on that "speech." The majority's reasoning, and potential applicability to other state laws, are remarkable for several reasons.

The holding that all nude dancing is "speech" *per se* contravenes the well established principle that "speech" must be imbued with elements of communication, whether it be symbolic conduct such as burning a draft card or flag,[4] or an art form such as film, music, or musical theatre.[5] The rejection of the district court's finding also denies the factual nature of this Court's test to determine if conduct is "speech," *i.e.*, whether a particularized message is intended, and the same message is likely to be understood by viewers. *Spence v. Washington*, 418 U.S. 405, 409-411 (1974); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342, 353 (1989).

Assuming for the moment that all *dance* is "speech," the Seventh Circuit has further concluded that *nudity* in dance is also "speech." The majority apparently rejected the view, expressed in dissent, that nudity is no more than a *manner* of dancing rather than a form of expression in and of itself. (App. 69-70, Coffey, J. dissenting.)

And perhaps most remarkably, the majority found that Indiana's public indecency statute, which requires *de minimis* clothing of every person in any public place, is not a content-neutral regulation of conduct. Instead, in the absence of legislative history (Indiana does not record legislative history), the

---

[4] *United States v. O'Brien*, 391 U.S. 367 (1968) (draft card); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag).

[5] *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (movies are "a significant medium for the *communication* of ideas"); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-558 (1975) ("theatre usually is the acting out - or singing out - of the written word"); *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661, 674 (1989) ("Music, as a form of expression *and communication*, is protected under the First Amendment.") (all emphases supplied).

majority characterized the statute as an "attempt to ban nude dancing" which is "*directly* related to the suppression of free expression." (App. 14 & n. 7, emphasis in original.) This reasoning calls into question the public indecency statutes of many states, not to mention the common law crime of indecent exposure as it existed at the time of the ratification of the First Amendment.

Indecent exposure of one's body was a crime at common law, considered to be *malum in se*. *City Court of City of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54, 57 (1972) (and sources cited therein); see also *Ardery v. State*, 56 Ind. 328, 329-330 (Ind. 1877) (noting origins in Adam and Eve's donning of fig-leaf aprons); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241, 243-244 (1952). Most if not all of the States have some type of statute prohibiting people from exposing themselves in public. (App. 54, Coffey, J. dissenting; App. 101, Manion, J. dissenting; see 3 *Wharton's Criminal Law* §§ 317-318 (C. Torcia 14th ed. 1980); 67 C.J.S. *Obscenity* §§ 10-11 (1978)).

Any public nudity law is called into question by the Seventh Circuit's reasoning, which is not limited to nude dancing inside bars and "bookstores" before consenting adults:

> Throughout this opinion, we use the general term "nude dancing" to refer specifically to non-obscene nude dancing of the barroom variety performed as entertainment.

(App. 3 n. 2.) What distinguishes this dancing, for the majority, is its "erotic message" and entertainment value, not the fact that it is performed indoors. It is not hyperbolic to suggest that the Seventh Circuit's holding brings within the First Amendment any person who appears nude in any public place, as long as he or she is dancing. (App. 91, Easterbrook, J. dissenting.)

Even if applied only to indoor nude dancing before consenting adults, this case potentially invalidates the indecent exposure or public indecency statutes of 17 states (in addition to Indiana) with statutes that proscribe public nudity without

expressly requiring lack of consent or offense on the part of the viewer.[6]

C. This case is an appropriate vehicle for deciding the questions presented.

For several reasons, this case presents the issues surrounding nude dancing under the First Amendment in a direct manner.

As noted, the state law invalidated by the Seventh Circuit is typical of public indecency or indecent exposure statutes in force in many states, and the case will have widespread relevance. The dancing involved represents typical nude "go-go" dancing performed in typical establishments, and the videotape submitted by the plaintiffs is clear and accurate evidence of the nature of the dancing. There are no material factual disputes; both of the questions presented were addressed on the merits by the court of appeals.

One of the respondent businesses (Glen Theatre, Inc.) and its dancers (Sutro and Johnson) do not sell or serve alcoholic beverages, and the statute is not limited to establishments that do so. Therefore the First Amendment issue is not clouded by the applicability of the Twenty-first Amendment, as it has been in other cases. See *California v. LaRue*, *supra*; *New York State Liquor Authority v. Bellanca*, *supra*; *City of Newport, Kentucky v. Iacobucci*, *supra*.

---

[6] See Ark. Stat. Ann. § 5-14-112; Colo. Rev. Stat. § 18-7-301; Conn. Gen. Stat. Ann. § 53a-186; Del. Code Ann. tit. 11, § 1341; Fla. Stat. Ann. § 800.03 (West); Ga. Code Ann. § 16-6-8 (1981); Ill. Ann. Stat. ch. 38, § 11-9 (Smith-Hurd); Kan. Stat. Ann. § 21-3508 (Supp. 1990); La. Rev. Stat. Ann. § 14:106A(1); Md. Ann. Code art. 27, § 335A; Mass. Gen. L. Ann. ch. 272, § 53; Mich. Comp. Laws Ann. § 750.335a; Minn. Stat. Ann. § 617.23; Miss. Code Ann. § 97-29-31; Nev. Rev. Stat. § 201.220; N.C. Gen. Stat. § 14-190.9; Or. Rev. Stat. § 163.445; S.C. Code Ann. §§ 16-15-130, 16-15-365 (Supp. 1989); Vt. Stat. Ann. tit. 13, § 2601 (Supp. 1989); Va. Code Ann. § 18.2-387; Wisc. Stat. § 944.20; Wyo. Stat. § 6-4-201(a); see also D.C. Code Ann. § 22-1112; V.I. Code Ann. tit. 51, § 1021; Cal. Penal Code § 314 (West) (permitting local ordinances).

Neither is the case complicated by the possibility that the dancing is outside the First Amendment because it is obscene, the defendants having conceded that point in both the court of appeals and the district court. (App. 3; 154 n. 3.) Thus the case is distinguished from *Young v. Arkansas*, 474 U.S. 1070 (1986), in which the dancer arguably performed an obscene dance, and the state court did not consider her claim as to nonobscene dancing. See *Young v. State*, 286 Ark. 413, 692 S.W.2d 752, 754 (1985).

For these reasons, this case presents important issues of federal law which should be settled by this Court. U.S. Sup. Ct. R. 10.1(c).

II. THE SEVENTH CIRCUIT'S DECISION IS IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT.

The Seventh Circuit has held that Indiana's public indecency statute, which generally prohibits nudity in public places, violates the First Amendment when applied to nonobscene nude dancing of the barroom variety. In reaching this conclusion, the majority held "as a matter of law" that such dancing "performed as entertainment is expression," and thus amounts to protected speech. (App. 8.) This finding was based on the conclusion that dance is "[i]nherently . . . the communication of emotion or ideas" (App. 9), and that barroom nude dancing communicates an "emotional" theme of "eroticism and sensuality" (App. 11).

This holding is clearly in conflict with decisions of the Indiana Supreme Court upholding and applying the same statute, *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980); and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). In *Baysinger*, in the absence of a claim that the nude dancing at issue involved expression of ideas, the court held that the activity was "conduct, not speech," and therefore not within the First Amendment. 397 N.E.2d at 587.

Other state courts of last resort have reached the same conclusion. The leading decision is *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113-114, *cert. denied* 396 U.S. 901 (1969), in which the court held that nude barroom dancing lacked elements of communication, and was performed solely as part of the commercial enterprise of the establishments involved. The court concluded that the dancing was mere conduct, which brought it within the police powers of the state.

In *Hoffman v. Carson*, 250 So.2d 891, 893-894 (Fla.), *appeal dismissed for want of substantial federal question* 404 U.S. 981 (1971), the court rejected a nude dancer's claim that her dancing was an "artistic endeavor" protected by the First Amendment. Under the circumstances, the court held that she had lost sight of "the distinction between speech and conduct," and noted that the act of appearing nude in public was a crime at common law.

In *Major Liquors, Inc. v. City of Omaha*, 188 Neb. 628, 198 N.W.2d 483, 487-488 (1972), the court held that nude barroom dancing is conduct not protected by the First Amendment. The holding did not turn on the fact that alcoholic beverages were served on the premises.

In *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503, 504-505 (1973), nude dancing was held to have "nothing to do with the 'exercise of freedom of expression,'" but "consisted entirely of the conduct of appearing naked" in violation of Arkansas' public indecency law, notwithstanding the fact that the dancers' breasts were painted on stage before they danced.

In *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980), the court held that barroom nude dancing did not contain sufficient communication of content that its proscription was an unconstitutional abridgement of speech. While the decision also mentions the States' police powers under the Twenty-first Amendment, it is clear that the court's conclusion is based

primarily on the nature of the dancing. The court relied heavily on this Court's dismissal of the appeals in *Baysinger, supra*.

Most recently, the court in *State v. Walters*, 440 So.2d 115, 121-122 (La. 1983), found no First Amendment violation in applying Louisiana's indecent exposure statute to women exhibiting their genitals in glass booths without music. The next year an intermediate appellate court reached the same conclusion as to nude dancers, and the supreme court denied review. *State v. Jacobson*, 459 So.2d 1285, 1289-1290 (La. App. 1984), *writ denied id.* (La. 1985).

Finally, at least one intermediate appellate court has concluded that Michigan's indecent exposure statute could be constitutionally applied to nude dancing because it was not designed to prohibit speech. The Michigan Supreme Court denied review. *People v. Wilson*, 95 Mich. App. 440, 291 N.W.2d 73, 74-75, *leave to appeal denied* 409 Mich. 925 (1980).

These opinions demonstrate that the Seventh Circuit "has decided a federal question in a way in conflict with a state court of last resort," a consideration which demonstrates the need for this Court to grant the writ of certiorari. U.S. Sup. Ct. R. 10.1(a).

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

219 State House
Indianapolis, Indiana 46204
(317) 232-6333

Counsel for Petitioners

June 29, 1990

90-26

Supreme Court, U.S.
FILED
JUL 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1989

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

LINLEY E. PEARSON
Attorney General of Indiana
WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)
219 State House
Indianapolis, Indiana 46204
(317) 232-6333
Counsel for Petitioners

Graphics LTD., Indianapolis, IN 46202

TABLE OF CONTENTS

Page

En Banc Decision of Seventh Circuit (May 24, 1990) (judgment appealed from) 1

In Reverse Chronological Order:

Order of Seventh Circuit Vacating Panel Decision (January 8, 1990) 110

Panel Decision of Seventh Circuit after Remand (October 19, 1989) 112

Memorandum and Order of District Court on Remand in Consolidated Cases (September 9, 1988), as Supplemented by Memorandum and Order on Motion to Alter or Amend Judgement (October 21, 1988) 120

Decision of Seventh Circuit on First Appeal (*Glen Theatre v. Pearson*, September 30, 1986) 140

Order of District Court in *Glen Theatre* Granting Permanent Injunction (October 10, 1985) 148

Memorandum and Order of District Court in *Glen Theatre* Granting Preliminary Injunction (July 26, 1985) ... 149

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-3006, 88-3244

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,

Plaintiffs-Appellants,

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division.
Nos. 85 C 598 & 85 C 353—**Allen Sharp**, *Chief Judge.*

ARGUED MAY 25, 1989—
REARGUED *EN BANC* JANUARY 31, 1990—
DECIDED MAY 24, 1990

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, MANION, and KANNE, *Circuit Judges.*

FLAUM, *Circuit Judge*, joined by BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER and RIPPLE, *Circuit Judges.* In this case we are asked to reconsider our unanimous decision in *Miller v. City of South Bend*, 887 F.2d 826 (7th Cir. 1989) in which we held that Indiana's Public Indecency statute, IND. CODE 35-45-4-1, was

unconstitutional as applied because non-obscene barroom variety nude dancing performed as entertainment is expression and, as such, is entitled to limited protection under the first amendment. That opinion was subsequently vacated based on a majority vote by the judges of this Court and we reheard oral argument *en banc* on January 31, 1990.

The extensive substantive and procedural history of this case is adequately discussed in our vacated opinion and we need not repeat ourselves here. *See Miller*, 887 F.2d at 829. The underlying facts of this matter are uncontested. Plaintiff J.R.'s Kitty Kat Lounge is a drinking establishment located in the City of South Bend that prior to the enactment of the ordinance in question provided nude dancing as entertainment for their patrons. Plaintiff Glen Theatre, an establishment which does not serve alcoholic beverages, similarly provided nude dancing as entertainment. Plaintiffs Darlene Miller, Gayle Sutro and Carla Johnson are dancers who wish to engage in such activity. The plaintiffs, in two separate actions that were consolidated on appeal, filed suits in the district court to enjoin the State of Indiana from enforcing its public indecency law to prevent them from presenting nude and semi-nude barroom dancing. The statute, IND. CODE 35-45-4-1, on its face provides for a total ban on nudity in public places. Violation of the statute is a Class A Misdemeanor. It broadly defines nudity as "the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state."[1] Obviously, the activity the plaintiffs seek to engage in falls within this definition.

[1] IND. CODE 35-45-4-1 provides in full:

Public Indecency

Section 1. (a) A person who knowingly or intentionally, in a public place:

(Footnote continued on following page)

We stress from the outset the limited scope of our inquiry today. This case does not concern obscenity, as the State has conceded that the dancing involved is non-obscene. It also does not concern whether these establishments are "public places" under the statute; the plaintiffs acknowledge that they are. *See State v. Baysinger*, 397 N.E.2d 580, 583 (Ind. 1980). And we are not concerned with any alleged overbreadth problems; that issue has already been resolved by this Court. *See Glen Theatre v. Pearson*, 802 F.2d 287 (7th Cir. 1987). Rather, the issue presented for this Court is a narrow one: whether non-obscene nude dancing of the barroom variety, performed as entertainment, is expression and thus entitled to protection under the first amendment.[2] Our analysis of the first amendment, based upon Supreme Court teachings and prior lower federal court decisions, directs us to the conclusion that such expression is entitled to limited protection and thus the statute is unconstitutional as applied.

I.

In addressing the issue before us, we recognize that we are not writing on a clean slate. While yet to delineate the precise scope of the protection afforded nude dancing, the Supreme Court, along with several circuit and district courts, has repeatedly and consistently intimated

[1] *continued*

(1) engages in sexual intercourse;
(2) engages in deviate sexual conduct;
(3) appears in a state of nudity; or
(4) fondles the genitals of himself or another person;

commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of the covered male genitals in a discernibly turgid state.

[2] Throughout this opinion, we use the general term "nude dancing" to refer specifically to non-obscene nude dancing of the barroom variety performed as entertainment.

that nude dancing performed as entertainment is protected activity under the first amendment. The Court first addressed the issue of first amendment protections for adult entertainment in *California v. LaRue*, 409 U.S. 109 (1972), where local bar owners sought a declaratory judgment that regulations promulgated by California's Department of Alcohol Beverage Control regulating the type of entertainment that could be presented in nightclubs or bars were unconstitutional because they abridged the freedom of expression guaranteed by the first and fourteenth amendments. The regulations in question "provided that liquor by the drink shall not be served in places where certain grossly sexual exhibitions are performed." *Id.* at 119 (Stewart, J., concurring). Reviewing the legislative history, the Court observed that the regulations were aimed at "bacchanalian revelries" that went far beyond simple nude dancing and entered the realm of obscenity. Overturning the district court's grant of the declaratory judgment, the Court held that the State was empowered under the twenty-first amendment to regulate such entertainment in establishments that serve liquor. In so holding, the Court recognized that "some of the performances to which these regulations address themselves are within the limits of the constitutional protection of freedom of expression . . ." *Id.* at 118. The Court was unanimous in agreement regarding this principle. The dissent by Justice Brennan found that the regulation "clearly applies to some speech protected by the First Amendment . . ." *Id.* at 123 (Brennan, J., dissenting). In a separate dissent, Justice Marshall noted evidence that the regulations may have been enacted for the "specific purpose of evading" the standards imposed on obscenity laws and that "the Government may suppress expression treating with sex only if it meets the three-pronged *Roth-Memoirs* [obscenity] test." *Id.* at 139 (Marshall, J., dissenting).

In the next case before the Court involving nude dancing, the justices strengthened their apparent recognition that the activity may be protected expression. In *Doran v. Salem Inn*, owners of three topless bars sought a temporary injunction against a Northhampton, New York, town ordinance which prohibited topless dancing in "[a]ny public place." 422 U.S. 922 (1974). The Court, per Justice Rehnquist, declared that "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, we recognized [in *LaRue*] that this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances." *Id.* at 932. The Court upheld the grant of a preliminary injunction on the grounds that, unlike the ordinance in *LaRue*, the ordinance was overbroad because it applied to all commercial establishments and thus was not justifiable under the twenty-first amendment.

The Court reached differing conclusions in *LaRue* and *Doran* concerning statutes regulating adult entertainment. In doing so, it drew a distinction between an establishment which serves alcohol and one which does not. The ordinance in *LaRue* was upheld because it was within the confines of the state's power under the twenty-first amendment whereas the ordinance in *Doran* was not. These two cases can be reconciled only on the implicit assumption that the regulated activity, topless dancing, was protected by the first amendment. Otherwise, the state's police power would be sufficient to support the statutes in both cases. This implicit assumption was made explicit in the Court's next encounter with nude dancing, *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981).

In *Schad*, the Court addressed a city zoning ordinance that prohibited all live entertainment. The defendants, operators of an adult bookstore, were convicted of violating the ordinance by offering to its customers the opportunity to view a live nude dancer. The Court overturned the convictions finding that the ordinance, by restricting all forms of live entertainment, was overbroad and thus violative of the first and fourteenth amendments.

The Court began its analysis by discussing the scope of the broadly drafted city ordinance: "Here the Borough totally excludes all live entertainment, including non-obscene nude dancing that is otherwise protected by the

First Amendment." *Id.* at 68. From this starting point, the Court went on to discuss the protections afforded nude dancing under the first amendment. It noted that "[n]udity alone does not place otherwise protected material outside the mantle of the first amendment." *Schad*, 452 U.S. at 66 (citation omitted). The Court went on to state that "[n]or may an entertainment program be prohibited solely because it displays the nude human figure . . ." Based on these principles the Court concluded "*nude dancing is not without its First Amendment protections from official regulations.*" *Id.* (citations omitted) (emphasis added). The Court, while finding it unnecessary to define precisely the scope of the protection afforded the activity, unmistakably recognized that in some circumstances it falls within the ambit of the first amendment.

The majority's position on nude dancing in *Schad* was accepted by the entire Court. Chief Justice Burger, joined by Justice Rehnquist, dissented on the overbreadth issue but accepted the majority's view on nude dancing. The Chief Justice concluded that "the fact that a form of expression [nude dancing] enjoys some constitutional protection does not mean that there are not times and places inappropriate for its exercise." *Id.* at 86 (Burger, C.J., dissenting). Justice Stevens, in a concurring opinion, recognized that "the foliage of the First Amendment may cast protective shadows over some forms of nude dancing . . ." *Id.* at 80. As a result of the Court's agreement on this issue, *Schad* has generally and continually been recognized by lower courts for the proposition that nude dancing is protected expression.

In the Court's post-*Schad* decisions it has consistently re-affirmed its position in *Schad* that nude dancing performed as entertainment falls within the scope of the first amendment. In *Young v. Arkansas*, 474 U.S. 1070 (1985), Justice White, joined by Justice Brennan in dissenting from denial of certiorari, recognized the Court's "repeated indications that barroom nude dancing is a type of expression that is protected under the First Amendment" and

urged an explicit holding regarding the scope of that protection. In addition, in *Massachusetts v. Oakes*, 109 S.Ct. 2633, 2642 (1989), Justice Brennan, in a dissent joined by Justices Marshall and Stevens, declared that *Schad* affords nude dancing protection under the first amendment, and that modeling, like nude dancing, "enjoys like shelter under the First Amendment." *See also Sable Communications v. FCC*, 109 S.Ct. 2829, 2836 (1989) ("[s]exual expression which is indecent but not obscene is protected by the First Amendment"); *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 719 (1980) (Stevens, J., dissenting) (stating that in *LaRue* the Court recognized "the protected expression implicated by nude dancing"). Most recently, in *FW/PBS, d/b/a Paris Adult Bookstore II v. City of Dallas*, 110 S.Ct. 596 (1990), the Court addressed a challenge to an ordinance enacted by the City of Dallas regulating "sexually oriented businesses" through a scheme incorporating zoning, licenses, and inspections. Various adult establishments, including several providing live nude dancing, sued for declaratory relief and a temporary as well as a permanent injunction. Six justices agreed that the ordinance violated the first amendment by establishing a licensing scheme without adequate procedural safeguards as required by *Freedman v. Maryland*, 380 U.S. 51 (1965), but they split into two camps as to what safeguards are required in this context. Justice O'Connor, writing for the three-member plurality, began her analysis by noting that

> [a]lthough the ordinance applies to some businesses that "apparently are not protected by the First Amendment, e.g., escort agencies and sexual encounter centers, it largely targets businesses purveying sexually explicit speech which the city concedes for purposes of these cases are protected by the First Amendment. Cf. *Smith v. California*, 361 U.S. 147, 150 (1959) (bookstores); *Southeastern Promotions, Ltd. v. Conrad, supra*, (live theater performances); *Young v. Mini Theaters, Inc.*, 427 U.S. 50 (1976) (motion picture theaters); ***Schad v. Mount Ephraim*, 452 U.S. 61 (1981) (nude dancing).**

Paris Adult Book Stores II, at 604 (emphasis added). The plurality then concluded that "the businesses challenging the scheme have a valid First Amendment interest." This recognition that the first amendment affords nude dancing some protection is implicit throughout the plurality opinion. With the exception of Justice Scalia in dissent, no other justice took issue with the plurality's position on nude dancing.

II.

From this reading of Supreme Court precedent,[3] we are constrained to hold today that, as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment. In reaching this conclusion, we are well aware that the distinction between conduct and expression is an elusive one.[4] While clearly not all conduct is expression, dance as entertainment is a form of conduct that is inherently expressive.

---

[3] In dissent, Judge Easterbrook charges us with taking the position that the Supreme Court has already affirmatively decided the issue presented today. We take no such position. To the contrary, we have simply analyzed the relevant Supreme Court and lower court pronouncements in this difficult and sensitive area of the law. As an intermediate federal court, we are obligated to interpret the present state of the law as well as envision what the Supreme Court would hold if directly presented with the issue.

[4] Judge Easterbrook's dissent argues that we should not attempt to discern the line between conduct and speech because doing so draws us into the province of the legislature. Dissent slip op. at 96-99. It argues that by adhering to the broad categories of "speech" and "conduct" we can avoid this infringement. We respectfully suggest that doing so begs the question as to what is protected and what is not. We therefore decline the invitation to abdicate or avoid our responsibility to interpret the Constitution consonant with Supreme Court direction.

We begin with a brief examination of the mode of expression involved. Dance as entertainment is one of the earliest forms of expression known to man. Its written history goes back at least as far as fifth century classical Greece, where Euripides described the frenzied fertility dance in his drama *Bacchae*. Dance also has biblical roots. *See e.g.*, *Psalms* 149:3 ("let them praise his name with dancing, making melody to him with timbre and lire!"); *Psalms* 150:4 ("Praise him with timbrel and dance . . ."). In ancient Rome, dancing was an important part of the annual festivals of Lupercalia and Saturnalia which featured wild group dances that were the precursors of the later European carnival. Eroticism in dancing also has ancient origins. The modern-day belly dance, or *baladi*, can be traced to the Egyptians of the fourth century, B.C. Buonaventura, W. *Serpent of the Nile* (1990). From these ancient roots one can trace the forms of dance native to America. Indeed dance pervades our culture, from the American Ballet Theater to Broadway's *A Chorus Line* and *West Side Story*, from Hollywood's Astaire and Rogers to the local discotheque.

Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 16 The New Encyclopedia Britannica 935 (1989). Inherently, it is the communication of emotion or ideas. At the root of all "[t]he varied manifestations of dancing . . . lies the common impulse to resort to movement to externalise states which we cannot externalise by rational means. This is basic dance." Martin, J. *Introduction to the Dance* (1939). Aristotle recognized in *Poetics* that the purpose of dance is "to represent men's character as well as what they do and suffer." The raw communicative power of dance was noted by the French poet Stéphanie Mallarmé who declared that the dancer "writing with her body . . . *suggests* things which the written work could *express* only in several paragraphs of dialogue or descriptive prose."

Any attempt to distinguish "high" art from "low" entertainment based solely on the advancement of *intellectual ideas* must necessarily fail. Judge Easterbrook contends in dissent that music and ballet are protected because music appeals to the intellect and ballet tells stories, whereas nude dancing offers neither. Dissent slip op. at 87. Not all ballet tells stories, however, and not all music appeals to the intellect. The art/entertainment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought; this attempted demarcation would leave them essentially unprotected.

The State in effect advances the proposition that the dance involved loses its expressive qualities as the dancers lose their clothing. It is well established, however, that "[n]udity alone does not place otherwise protected material outside the mantle of the first amendment." *Schad*, 452 U.S. at 66 (citation omitted). Nor does the fact that the dance is sexual remove the mantle of protection: "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications v. FCC*, 109 S.Ct. 2829, 2836 (1989). And it is immaterial for constitutional purposes that nude dancing may be performed for profit. *See Joseph Burstyn v. Wilson*, 343 U.S 495 (1952). The State's position, therefore, distills down to the assertion that nude dancing is distasteful and/or morally repugnant.

While the ideas communicated by a particular dance may well vary according to the context in which it is performed, the communication of expression clearly does not. Attempts to distinguish between expressive and nonexpressive dance are misconceived and bring to mind the words of Justice Harlan in *Cohen v. California*, 403 U.S. 15, 25 (1970): "[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." It is irrelevant for the purposes of our inquiry that we may find the expression

inherent in nude dancing to be at odds with our particular tastes; just last Term the Court re-affirmed its belief that "[i]f there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 109 S.Ct. 2533, 2544 (1989). As the Second Circuit has stated:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person [at the local pub].

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)). The State conceded as much at oral argument when it agreed that the plaintiffs' precise dance routines would certainly be protected expression if they were performing the same routines but choreographed as part of a graduate Ph.D. thesis.

To determine whether this activity is sufficiently embodied with communicative expression to warrant first amendment protection, we must ask whether "[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who view it." *Texas v. Johnson*, 109 S.Ct. 2533, 2539 (quoting *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality.[5] Though this dance is clearly of inferior

[5] To the extent that the district court found otherwise, we find that it was clearly erroneous. Contrary to the positions taken by Judges Coffey (dissent slip op. at 71-72) and Easterbrook (dissent slip op. at 85-86) in dissent, the parties' characterizations (or the lack thereof) of their artistic endeavours as expressive or nonexpressive, while possibly relevant, cannot be determinative nor binding upon this Court for first amendment purposes.

artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' *Salome*, the erotic message communicated to the viewers is present in both performances. That Strauss' *Salome* tells a compelling story and the nude dancing at the Kitty Kat Lounge may not is not determinative; expression does not lose its protection for lack of a scripted plot. And it is apparent that those who view the respective dances readily comprehend the intended messages, for they advance currency to view them. The success of both the ballerina in an erotic production and the nude dancer in a barroom setting depend on the communication of their sensual message.

As stated above, dance as entertainment inherently embodies the expression and communication of ideas and emotions. The State's reliance on the nudity and the unappealing nature of the dance involved here do not serve to remove the partial cloak of protection afforded by the first amendment. Nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless.

Not only does our holding today comport with Supreme Court precedent, it also is in consonance with the holdings of the numerous federal courts that have addressed the issue. The two Circuit Courts of Appeal that have confronted the protections afforded nude dancing, the Ninth and the Eleventh, have held that it is protected activity under the first amendment. *See International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (citing *Schad* to support the proposition that "we may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers"); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985) (in addressing ordinance barring topless dancing, the court noted that "we are bound to treat topless dancing as a form of expression which is protected at least to some extent by the First

Amendment"); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986) (relying on *Schad* and *Doran* for its determination that "topless dancing [is] expression, subject to constitutional protection within the free speech and press guarantees of the first and fourteenth amendments); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (in holding that nude dancing is protected activity, the court found that the assertion that "barroom nude dancing is not First Amendment activity because it is non-expressive and lacks any communicative content" is "controverted by *Schad*"); *Kuzinich v. County of Santa Clara*, 689 F.2d 1345 (9th Cir. 1982). The district courts are in general agreement as well. *See, e.g., Walker v. City of Kansas City, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988) (citing *Schad* for proposition that "since an entertainment program may not 'be prohibited solely because it displays the human nude figure,' nude dancing is protected expression under the First Amendment"); *Doe v. City of Minneapolis*, 693 F. Supp. 774, 779 n.12 (D. Minn. 1988) ("live nude dancing is also protected expression under the First Amendment").[6]

---

[6] The commentators have agreed with this interpretation of *Schad*. For a representative sampling, see: Stone et al., *Constitutional Law* 1167 (1986); Day, *The Incidental Regulation Of Free Speech*, 42 U. Miami L.Rev. 491 (1988); Rice, *The Search For Valid Governmental Regulations: A Review Of The Judicial Response To Municipal Policies Regarding First Amendment Activities*, 63 Notre Dame L.Rev. 561 (1988); Giokaris, *Zoning And The First Amendment: A Municipality's Power To Control Adult Use Establishments*, 55 UMKC L. Rev. 263 (1987); Note, *The Role Of "Secondary Effects" In First Amendment Analysis:* Renton v. Playtime Theatres, Inc., 22 U.S.F. L. Rev. 161 (1987); Poole, *Architectural Appearance Review Regulations And The First Amendment: The Good, The Bad, And The Consensus Ugly*, 19 Urb. Law. 287 (1987); Note, *Trademark Parody: A Fair Use And First Amendment Analysis*, 72 Va. L. Rev. 1079 (1986); Kellam & Lovelace, *To Bare Or Not To Bare: The Constitutionality Of Local Ordinances Banning Nude Sunbathing*, 20 U. Rich. L. Rev. 589 (1986); Rich & Brilliant, *Defamation-In-Fiction: The Limited Viability of Alternative Causes of Action*, 52 Brooklyn L. Rev. 1 (1986);

(Footnote continued on following page)

Our inquiry cannot end here. Having concluded that the activity involved is within the ambit of the first amendment, we must next examine whether the Indiana statute is a valid restriction on that protected expression. Regrettably, Indiana does not record the legislative history of its statutes. At oral argument the State asserted that the purpose of the public indecency statute was the protection of public morality generally, and the family structure in particular. The State possesses the broad powers to effectuate this legitimate and significant interest through public education and the appropriate exercise of its police powers. However, in advancing this interest it must operate within the prescriptions of the first amendment.

It is a fundamental precept of the first amendment that all expression, whether it is written, pictorial or by way of performance, is presumptively protected against government interference and restraint. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The first amendment does not discriminate among ideas. The messages conveyed by the performances in question, no matter how unappealing to one's personal value system, are protected nonetheless. Indiana's attempt to ban nude dancing in pursuit of its aforementioned interest is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse.[7] "When the government, acting as censor, under-

[6] *continued*
Simon, *The Authority Of The Framers Of The Constitution: Can Originalist Interpretation Be Justified?*, 73 Calif. L. Rev. 1482 (1985); Yen, *Judicial Review Of The Zoning Of Adult Entertainment: A Search For The Purposeful Suppression Of Protected Speech*, 12 Pepperdine L. Rev. 651 (1985); Note, *Freedom of Speech- Regulation Of Live Entertainment*, 96 Harv. L. Rev. 231 (1981).

[7] In his dissent, Judge Easterbrook contends that the statute is "unrelated to the suppression of free expression." Dissent slip op. at 79. The stated purpose of the statute is the preservation of a particular set of views; those reflecting the Indiana legislature's

(Footnote continued on following page)

takes selectively to shield the public from some kinds of [expression] on the grounds that they are more offensive than others, the First Amendment strictly limits its power." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975). As we have recognized, "above all else, the First Amendment means that government has no power to restrict expression because of its message or ideas . . ." *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 328 (7th Cir. 1985), *aff'd without opinion*, 475 U.S. 1001 (1986) (Easterbrook, J.) (quoting *Police Department v. Mosley*, 408 U.S. 92, 95 (1972)). To those who understandably find objectionable the type of conduct sought to be condemned by the State, we offer the prescription of Justice Brandeis in *Whitney v. California*, to wit: "the remedy to be applied is more speech, not enforced silence." 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

This is not to suggest that the State is powerless to *regulate* the presentation of nude dancing. On the contrary, the State retains a great deal of control. A sovereign may establish reasonable time, place and manner restrictions on protected expression. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Such legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches. Similarly, it may regulate expressive conduct for reasons unrelated to the suppresion of speech. *United States v. O'Brien*, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted it by the twenty-first amendment. *California v. LaRue*, 409 U.S. 109 (1972); *City of Newport v. Iacobucci*, 107 S.Ct. 383 (1986). And it most certainly may ban obscene nude dancing. *Sable Communications*, 109 S.Ct. at 2835.

[7] *continued*
view of "public morality." In meeting this intended goal, the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision. As such, it is *directly* related to the suppression of free expression.

Despite the State's laudable concerns which apparently are the bases of the Indiana statute, the total ban at issue here does not fall within any of these constitutionally permissible areas of legislation. If the State wishes to regulate non-obscene expressive activity or public nudity, it may do so, but only in consonance with the first amendment.

III.

The statute is unconstitutional as applied. Accordingly, the judgment of the district court is REVERSED and the State is enjoined from enforcing its public indecency statute, IND. CODE 35-45-4-1, against these plaintiffs to prohibit non-obscene nude dancing as entertainment.

CUDAHY, *Circuit Judge*, concurring:

I concur in Judge Flaum's excellent opinion for the court. He has effectively marshalled the Supreme Court and other authority that points in the direction of constitutional protection for nude dancing *qua* entertainment. That authority compels a result that is correct in this case.

I do, however, have concerns that I shall briefly note. Despite impressive displays of scholarly analysis and broad-ranging erudition on all sides, the need to invoke the First Amendment here strikes me as a bit trivializing and, perhaps, unworthy. The application of the Amendment to these facts is correct as a matter of law. I believe we of the majority are doing what the law commands, but the high purposes of the Amendment seem, in these circumstances, in some danger of being lost. I hasten to add, however, in that connection that I do not think it appropriate to make fine distinctions between the favored entertainments of "Joe Sixpack" and those of "Mrs. Gotrocks." As the majority notes, the Free Speech Clause, by protecting the freedom of expression, necessarily leaves matters of expression and style to the individual.

It seems to me beyond doubt that a barroom striptease is "expressive." Even if relatively restrained, as are the

videos in evidence here, a striptease sends an unadorned message to a male audience. It is a message of temptation and allurement coupled with coy hints at satisfaction. In a real barroom, messages would probably also flow in the opposite direction, in the form of encouraging comments to the performer from the patrons.[1] These responses speak strongly to the fact that a message is being sent and received. It is also clear that the message of the striptease is not a subject that the Founding Fathers had in mind in drafting the First Amendment.[2] That fact is certainly not dispositive, nor perhaps even probative, but it suggests a need for caution in making the Amendment do service in situations as improbable as this one seems to me.

POSNER, *Circuit Judge*, concurring in the opinion and judgment of the court. Public performances of erotic dances débuted in Western culture in the satyr plays of the ancient Greeks, were suppressed by Christianity, and, with Christianity's grip loosening, reappeared in the late nineteenth and early twentieth centuries. They reappeared in a variety of forms: as the can-can and the music-hall chorus line, from which the Folies Bergère and its tame American counterparts—the Ziegfeld Follies, and more recently the Radio City Music Hall Rockettes and the chorus lines in Broadway and Hollywood musicals—descend. As the Dance of the Seven Veils in Richard Strauss's opera *Salome* (1905), from which the fan dancing of Sally Rand and the decorous striptease of Gypsy Rose Lee, or of Gwen Verdon in the musical comedy *Damn Yankees*, may be said to descend. Ballet was nothing new in the nineteenth century; but as the costumes of ballet dancers became scantier, the erotic element in ballet became more pronounced, reaching scandalous proportions in Diaghilev's

---

[1] *E.g.*, "Take it off; take it off!"

[2] No doubt, however, such messages—sent according to the style of the day—were known to the Framers.

L'après midi d'un faune (1912) (an example, and not an isolated one, of male erotic dancing) and becoming a staple of distinguished companies like the New York City Ballet and the American Ballet Theater. "Modern dance," a ballet offshoot pioneered by, among others, the erotic dancer Isadora Duncan, has long been partial to nudity. Examples of erotic dance in non-Western cultures include not only belly dancing but also the overtly erotic nude dancing of Les Ballets Africains de Keita Fodeba, which, but for its exoticism, would be considered shockingly explicit. For remarkable description of fertility dances see Sachs, World History of the Dance 85-104 (1937); on erotic and nude dancing generally, see Cheshire, *Eroticism in the Performing Arts*, in Webb, The Erotic Arts 297-306 (rev. ed. 1983); Sorell, Dance in Its Time 425-28 (1986). The law's efforts to restrict such dancing are detailed in an Annotation, *Topless or Bottomless Dancing or Similar Conduct as Offense*, 49 A.L.R.3d 1084 (1973), 49 A.L.R.3d Supp. 59 (1989).

De gustibus non est disputandum; but whether one has a taste or a distaste for erotic dance in general or striptease dances in particular, to say as the district judge did in this case that a striptease dance is not "expressive activity," but "mere conduct," *Glen Theatres, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988), is indefensible and a threat to artistic freedom. This is not to suggest that the State of Indiana has no power to regulate nude striptease dancing; it has ample power. But to try to justify that power, as the district judge in this case tried, on the ground that such dancing is not expression is misguided. And, *as the parties have framed the issues*, no alternative justification is possible in this case. The qualification is an important one, and I shall return to it.

An Indiana statute makes public indecency, including appearing nude in public, a crime. Ind. Code § 35-45-4-1(a)(3). The normal operation of the statute is illustrated by *Elliott v. State*, 435 N.E.2d 302 (Ind. App. 1982), where the defendant was convicted of urinating in public. However, in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979),

appeal dismissed for want of a substantial federal question under the name *Clark v. Indiana*, 446 U.S. 931 (1980), the Indiana Supreme Court interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public. The interpretation was not inevitable. *State v. Brooks*, 275 Ore. 271, 550 P.2d 440 (1976); compare *City of Chattanooga v. McCoy*, 645 S.W.2d 400, 401 (Tenn. 1983). But, having been made, it induced the Indiana court in *Baysinger*, in an effort to save the constitutionality of the statute, to carve out an exception for performances having an expressive character. That is how the issue of "expression" got into this case. If the striptease dances that the plaintiffs want to put on for their customers are not expressive, then since at the end of the dances the dancers are nude, the statute makes the dances criminal.

Indiana is exceptional although not unique among contemporary American states in attempting, without recourse to the Twenty-First Amendment, to impose a state-wide ban on erotic dance performances that are not obscene, merely because the performances involve nudity—and a bare breast is nudity within the meaning of the Indiana statute. The statute's reach may be an accident of interpretation. The intended scope may well have been narrower; and a differently drafted statute could, as I shall explain, achieve the state's legitimate goals without raising serious constitutional questions. So this case may be something of a freak; but it is a fascinating freak.

If the district judge had said that the dances in issue are not classy, he would have been on sound ground. The record contains a videotape of the dances that the proprietor of the "Kitty Kat Lounge" would like to exhibit. The name of the establishment does not promise high culture, nor the fact that it is a bar rather than a theater, nor (a related point) that the compensation of the dancers depends on the number of drinks they induce appreciative customers to buy after the dance. The dancers are presentable although not striking young women. They dance on a stage, with vigor but without accomplishment, to the

sound of a jukebox, and while dancing they remove articles of clothing (beginning, for example, with a glove) until nothing is left. Thirty years ago a striptease that ended in complete nudity would have been thought obscene. No more. It is worth pausing a moment to ask why. Nudity as titillation or outrage is relative rather than absolute. In a society in which women customarily go about in public bare-breasted, there is no shock value in a bare breast, while in Victorian England, where decent women were expected to wear dresses that reached from the top of the neck to the floor—where even the legs of furniture were sometimes clad for the sake of decency—a bare ankle was a sensation. Since then female dress has become progressively less modest, and today many decent women appear in public in states of undress (mini-skirts, hot pants, slit skirts, body stockings, see-through blouses, decolletage becoming outright topless evening wear) that would have been considered nakedness, or the garb of prostitutes, thirty years ago. A striptease that ended in a degree of nudity no longer suggestive of preparations for sex—a striptease that left the stripper garbed as she might be for an expedition to the supermarket—might lack erotic punch today.

In any event there is no contention that the stripteases of the "Kitty Kat" dancers are obscene. It would be difficult to make such a contention with a straight face at a time when a career respectable in the eyes of many people can be founded on posing in the nude for men's magazines. *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128 (7th Cir. 1985). The contention, rather, is that the dances are not expressive, so the First Amendment does not protect them, so there is no obstacle to enforcing the Indiana statute against the dancers and their accomplice, the proprietor of the Kitty Kat Lounge. If this reasoning is correct, the arts are in jeopardy.

Dance, as Judge Flaum emphasizes with pertinent references, is a medium of expression, of communication. What it expresses, what it communicates, is, like most art—particularly but not only nonverbal art—emotion, or more

precisely an ordering of sights and sounds that arouses emotion. Ballet is "an exact and flexible language to communicate formal fantasy." Denby, Dance Writings 507, 509 (1986). "In your excitement as you watch the quick dancing, it will often evoke in passing an intensely poignant fantasy image of human relations." *Id.* at 512. "Susceptibility to ballet is a way of being susceptible to animal grace of movement." *Id.* at 530. Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not *invariably* associated with sex. The goal of the striptease—a goal to which the dancing is indispensable—is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the preparations are complete. The sequel is left to the viewer's imagination. This is the "tease" in "striptease."

Because the dancers at the Kitty Kat Lounge are not professional dancers, because three of the four dances were not choreographed, because the music to which they dance is canned, and because the dancers sell drinks to the customers afterward, it is tempting to suppose that the "expressive" elements of their "performance" are phony—that the dance and the music are figleaves to conceal the absence of figleaves. Probably the supposition is erroneous; certainly it is not backed by evidence. The striptease was not invented in order to place a cultural patina on displays of naked women. Of course, there would be no female stripteases without a prurient interest in the female body; but that is just to say that there would be no erotic art without Eros. Though there is no striptease without some stripping—in today's moral climate, without a great deal of stripping—the dancing and the music are not distractions from the main theme, patched

on to fool the censor; they are what make a given female body expressive of a specifically sexual emotion. The striptease is the ensemble of the music, the dance, the disrobing, and the nude end state; it is more erotic than any of its components; and what makes it more erotic than the body itself, or the disrobing itself, is, precisely, that it is *expressive* of erotic emotion. The State of Indiana may be empowered to regulate or even suppress it, but not on the ground that it is not expression.

The conclusion that striptease is an expressive medium can be resisted on four grounds: the conclusion leads to a *reductio ad absurdum*; the only expression protected by the First Amendment is the expression of ideas and opinions; the amendment does not protect mere entertainment; the amendment protects speech, not conduct.

1. It is tempting to argue that a striptease just *can't* be expressive because if it is then everything is—including kicking one's wastebasket in anger and putting geraniums in a window box. These examples are not the same, however. There is a sense in which everything we do consciously and much of what we do unconsciously is expressive—is the visible counterpart to (or "expression" of) some "inner" mental state, often an emotion such as anger or fear or joy. Kicking the wastebasket is expressive in this sense. But the expression that is relevant to freedom of speech, and absent when the wastebasket is kicked in private, is the expression of a thought, sensation, or emotion *to another person*. This is a narrower concept of expression than the first but it is of course enormously broad, encompassing not only the geranium example but the whole field of human communication, verbal and nonverbal. We communicate with each other by dress, grooming, deportment, and gestures, as well as by words. Not everything in this enormous range of communicative activity is within the scope of the First Amendment. Social dancing is not. *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989). Nor is casual chit-chat. *Swank v. Smart*, No. 89-1360, slip op. at 4 (7th Cir. March 27, 1990). But what

is excluded is not excluded *because it is not expression*; it *is* expression.

Let me try to refine the distinction between the expressive and the protected with the following unrefined examples: a videotape of a couple engaged in sexual intercourse, filmed without their knowledge and exhibited to the patrons of the Kitty Kat Lounge; the same videotape, made to be shown to psychologists specializing in the treatment of sexual dysfunction; a videotape of a couple, also engaged in sexual intercourse, but the man and the woman are actors who endeavor by their movements and expressions to maximize the emotional impact of their act on the viewer. The first videotape is not expressive, but is obscene (nude sunbathing would also be nonexpressive, but would not be obscene). The second is neither. The third is expressive and obscene. The third is not saved from condemnation because it is expressive. Most pornography is expressive, indeed expressive of the same emotions that a striptease expresses. The difference is that the striptease is not obscene by modern standards.

If this analysis is wrong, our decision in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), aff'd without opinion, 475 U.S. 1001 (1986), is wrong. Indianapolis had enacted an ordinance forbidding "pornography," defined as "the graphic sexually explicit subordination of women" through various means including pictures of women in "postures or positions of . . . display." The videotape of the Kitty Kat dancers is pornography within the meaning of the ordinance. We held that the ordinance violated the First Amendment because it was an effort to control the way people think about women and sex. Neither the ordinance, nor our ground for invalidating it, would have made sense if pornography were not expressive in a sense relevant to the First Amendment. The doctrine that forbids restrictions on speech that are based on the viewpoint of the speaker is a doctrine of the First Amendment; its invocation presupposes that what is being restricted is speech. An ordinance that forbade nude

sunbathing would not violate the First Amendment even if the purpose was to change people's thinking about women and sex, because it would not be prohibiting "speech," however broadly defined. *People v. Hollman*, 68 N.Y.2d 202, 500 N.E.2d 297 (1986); *South Florida Free Beaches, Inc. v. City of Miami*, 734 F.2d 608 (11th Cir. 1984). Unless nonobscene pornography (a category that includes nude striptease dancing) is speech, the Indianapolis ordinance could not have violated the First Amendment.

2. The second argument against acknowledging that striptease dancing is expression is that it is not the *type* of expression that the First Amendment protects, because it is not the expression of ideas or opinions. Indeed it is not the expression of ideas or opinions (nor have the appellants ever contended otherwise). But if this were decisive against the application of the First Amendment, as urged for example in Wright, *A Rationale From J S. Mill for the Free Speech Clause*, 1985 S. Ct. Rev. 149, 164-69, it would thrust outside the amendment's boundaries virtually all nonverbal art—except the relatively small fraction that is didactic—and much literature as well. The implications for nonvocal music are particularly arresting. By straining one can perhaps find "ideas" in a few tone poems and other programmatic music. For example, the opening chords of Richard Strauss's *Ein Heldenleben* (*A Hero's Life*) may be said to convey an idea of the heroic. But what is really being conveyed is not an idea but a feeling, a feeling of grandeur that evokes or enhances the idea of the heroic; and in part the feeling is conveyed (or identified) by the title of the piece. Beethoven's heavy use of march themes lends, by association, a martial air to much of his music, yet it would be odd to describe the music as being "about" political or military affairs. Music that imitates the twittering of birds does not convey an ornithological "message," and Gustav Holtz's *The Planets* is not a treatise on astronomy. Some nonvocal musical works convey simple narratives, for example the story of the cathedral that rises from and sinks back into the sea,

"told" in Debussy's *La Cathedrale engloutie*. But narratives are not ideas, and anyway a striptease is a narrative quite as elaborate as that found in pantomimic ballets (such as *Romeo and Juliet*) and more elaborate than the narratives in wordless music. Most nonvocal music has no verbal—paraphrasable—content whatsoever, and much of it does not even express a specific emotion.

Admittedly, not all thought is verbal, especially if "language" is narrowly interpreted to exclude mathematics and other nonverbal symbolic systems. But even if "thought," "concept," "idea," and "opinion" are broadly defined, these are not what most music conveys; and even if music is regarded as a language, it is not a language for encoding ideas and opinions. Insofar as it is more than beautiful sound patterns, music, like striptease, organizes, conveys, and arouses emotion, though not sexual emotion primarily. If the striptease dancing at the Kitty Kat Lounge is not expression, Mozart's piano concertos and Balanchine's most famous ballets are not expression. This is not to suggest that striptease dancing is indistinguishable from these other forms of expression. But they cannot be distinguished on the ground that a piano concerto and a (nonpantomimic) ballet express ideas and a striptease expresses emotion. If the concerto and the ballet have meaning—and I do not doubt that there is a meaningful sense in which they do—so has the striptease.

Pictorial art is in some ways closer to striptease than music is, because so much painting and sculpture are of naked women. The distinguished collection of Titian nudes in the National Gallery in Washington includes *Venus With a Mirror*, which depicts a voluptuous, coiffed and bejewelled, golden-haired woman—nude within the meaning of Ind. Code § 35-45-4-1(b)—sitting on a couch and looking at her face in a mirror held up by a cherub (Cupid—his quiver is at his feet), while another cherub hovers beside her waiting to crown her with a wreath. Walker, The National Gallery of Art 209 (1975) (pl. 259). The painting does not express an idea, a thought, or an opinion. It

is not a sociological account of a sixteenth-century Venetian woman's toilette, or a treatise on classical mythology. It uses that mythology as a source of iconography, and to the extent that by doing so the painting evokes the story of Venus it may be said to have narrative content; but so does a striptease. What the painting primarily conveys to the viewer is not a story, let alone an idea or an opinion, but a complex of feelings—feelings of voluptuousness, sensuality, beauty, harmony, sumptuousness, sexual allure (we know what Venus is the goddess of).

We might try to close the gap between the intellectual and the emotional by saying that the painting expresses a *concept* of beauty, of opulence, of balance, and so forth. But among the "so forth" are feminine sexuality and desirability, and if these are "concepts" in *Venus With a Mirror* they are "concepts" in a striptease (or in a *Playboy* pin-up) in just the same sense. The striptease version is coarse, unsubtle, "artless," even degraded, but the two works are "conceptual" to the same degree. Feminists forcefully assert the continuity of high and low culture: "Within the history of art, the female nude . . . is a paradigm of Western high culture with its network of contingent values: civilization, edification, and aesthetic pleasure. The female nude is also a sign of those other, more hidden properties of patriarchal culture, that is, possession, power, and subordination." Nead, *The Female Nude: Pornography, Art, and Sexuality*, 15 Signs 323, 326 (1990). The feminists have a point, even if it is overstated; a more neutral observer (criticized by Nead, *id.* at 332) has called Titian's Venuses "highly erotic and presumably highly effective pin-ups for the rich and powerful." Webb, *supra*, 131.

The reason we think that art is an intellectual medium and therefore has nothing important in common with striptease is that most of us obtain no enjoyment from art. It requires an educated taste to distinguish *Venus With a Mirror* from a camp photo of a fat woman. Knowing that it is a cultural monument we assume that its significance must be intellectual, since it is dead to most of us

emotionally. But the painting is not an intellectual statement; there are no ideas in the painting. This would be even clearer if one were speaking of abstract rather than representational painting. There is pattern, design, harmony, and color in abstract painting, and these attributes evoke pleasure and other emotions in an appreciative viewer. But there is no story, no articulable idea, no verbal meaning. The notion that all art worthy of the name has a "message" is philistine, and leads to the weird conclusion that nonrepresentational art and nonprogrammatic, nonvocal music are entitled to less protection under the First Amendment than striptease dancing because the latter has a more distinct, articulable message. And likewise that Beethoven's string quartets are entitled to less protection than *Peter and the Wolf*.

I said earlier that nudity is a relative concept. The bare breast of Venus in *Venus With a Mirror* is tame stuff by modern standards and this tameness may lead us to downplay or even overlook the erotic element in the painting. If we consider instead the nudes of a great modern master, such as Balthus (Balthasar Klossowski), we cannot overlook the primacy of the erotic in nude painting. For examples, see *Alice*, *Nude With a Cat*, and *The Room*, in Rewald, Balthus 28, 117-19 (1984) (fig. 35 and pls. 31 and 32). Balthus's eroticism happens not to be of the innocent and wholesome variety; it is sinister, creepy, obsessed with the bodies of prepubescent girls (girls Lolita's age), "Freudian," at times sadistic. Balthus is a great artist whose artistic interest in the female body is prurient. Strauss's *Salome*—whose Dance of the Seven Veils is everyone's favorite example of constitutionally protected striptease—is a classic of *fin de siècle* decadence; it is surpassed in unwholesomeness only by Oscar Wilde's play *Salomé*, which supplies the libretto for *Salome*, and by Aubrey Beardsley's illustrations for *Salomé*. The difference between Balthus' presentation of the naked female body and that of the dancers at the Kitty Kat Lounge is that he is a great artist and they are undistinguished popular entertainers. It is not a difference in kind; it is

not a difference between expressive and nonexpressive activity; it is not a difference between arty nudes and naked bodies. It is a difference in aesthetic quality, and while such differences can redeem obscene art, *Miller v. California*, 413 U.S. 15, 24 (1973), they cannot justify the suppression of the nonobscene.

Some paintings—Rembrandt's portraits, for example—we are inclined to call "profound." This usage is fine, provided we understand that the profundity in question is not intellectual but emotional. Here is a description of the self-portrait that Rembrandt painted in 1659 (Walker, *supra*, at 271 (pl. 357)), three years after he had declared bankruptcy. "He saw reflected [in the mirror from which he painted the portrait] a face lined with age and misfortune. He saw eyes which had searched more profoundly into the human soul than those of any other artist. He saw a mouth and chin weak, infirm of purpose, manifesting that flaw in his character which had ruined his life. His hands are grasped as though in anguish at the spectacle of a self-ruined man. There exists no painting more pitiless in its analysis or more pitiful in its implications." *Id.* at 270. "Analysis" is being used here in a special sense. There is nothing discursive, verbal, intellectual in the portrait. It is not a commentary on bankruptcy law, human weakness, or social injustice. It is the pictorial rendition of the emotions that a man in whom great talent is mixed with great weakness might feel. The mood is remote from that of Venus looking in her mirror but the difference has nothing to do with the epistemic character of these paintings. The difference between the intellectual and the emotional is not the difference between heavy and light. There are solemn emotions, and there are frivolous ideas.

The emotional element predominates in much verbal art as well as in most nonverbal art. When T.S. Eliot wrote

> Highbury bore me. Richmond and Kew
> Undid me. By Richmond I raised my knees
> Supine on the floor of a narrow canoe.

> My feet are at Moorgate, and my heart
> Under my feet. After the event
> He wept. He promised 'a new start.'
> I made no comment. What should I resent?

he was not expressing an idea; he was finding a form of words by which to convey the emotion of sexual revulsion. There is an analogy to the distinction in copyright law between idea and expression. Eliot could not have obtained copyright protection for any of the ideas that might be extracted from *The Waste Land* by paraphrase: in the passage I have quoted, the idea that sex is sordid and disgusting. He could obtain copyright protection only for the precise verbal form in which the idea was expressed. It is the expression that gives the idea impact, just as it is the dancing and the music and the stripping that give the nudity of the striptease dancer impact. The idea in itself is nothing—banal, undeveloped, mostly false—just as nudity in itself is nothing, or very little. These are just the materials from which the great writer or the popular entertainer makes the emotional brew that we call art or popular entertainment. In either case the artist's business is emotion, not ideas. Of one literary artist Eliot said, "He had a mind so fine that no idea could violate it." *Henry James*, in Selected Prose of T.S. Eliot 151 (Kermode ed. 1975).

One can argue from the text and background of the First Amendment that the constitutional protection of freedom of speech is limited to the discursive and the didactic, that nondidactic art should be totally excluded, or at the very least that low-grade erotic entertainment should be—the Founding Fathers would writhe in their graves if they knew that the nude dancers of the Kitty Kat Lounge could unwrap themselves with the First Amendment. And one can reply that such arguments merely demonstrate the inadequacy of original understanding as a guide to constitutional interpretation; that they would if accepted change the Constitution from a living document into a petrified reminder of the limits of human foresight; that a conception of free speech which privileges the burning of the

American flag (*Texas v. Johnson*, 109 S. Ct. 2533 (1989)) but permits government to ban performances of twelve-tone music is more absurd than one that protects flag burning, twelve-tone music, and striptease; and that if the purpose and scope of the First Amendment's speech and press clauses are exhausted in the protection of political speech, because freedom of political speech is all that is necessary to preserve our democratic political system, this implies the exclusion from the amendment's protections not only of all art (other than the political) but also of science. For one can have democracy without science, just as one can have democracy without art.

The debate has been resolved—for judges at our level anyway, and for now anyway—by the decisions anatomized in Judge Flaum's opinion, particularly the Supreme Court's decision last term in *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (citations omitted):

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical compositions to serve the needs of the state. The Constitution prohibits any like attempts in our own legal order. Music, as a form of expression and communication, is protected under the First Amendment. In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guidelines must meet the demands of the First Amendment.

The rock music in question had lyrics. But the Court's reference in the second sentence to music's appeal to the emotions, and its citation (omitted from the quotation) to an article about Soviet ambivalence toward Stravinsky—a composer primarily of nonvocal music—make it implausible to suppose that the Court thought it was speaking

only of vocal music; and it did not say it was. In another decision the Court has said that "entertainment, as well as political and ideological speech, is protected" by the First Amendment. *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981). This court has held that wordless music is speech within the meaning of the amendment. *Reed v. Village of Shorewood*, 704 F.2d 943, 950 (7th Cir. 1983).

I am less interested in particular decisions than in fundamental principle. If the only expression that the First Amendment protects is the expression of ideas and opinions, then most music and visual art, and much of literature, are unprotected. This would be a shocking contraction of the First Amendment as it has come to be understood. If the only way to exclude nude dancing from the protection of the amendment is to exclude all nonpolitical art and literature as well, the price is too high. "A rule cannot be laid down that would excommunicate the paintings of Degas." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903).

3. Maybe the price need not be paid; maybe "mere entertainment" is not constitutionally protected after all. The passage I quoted from *Schad* cannot have been meant literally. Anything that gives pleasure can be counted as entertainment, yet not everything that gives pleasure is expressive. I might find a display of northern lights entertaining; this would not make that display an expressive activity. However, while not all entertainment is expressive, some certainly is. Art is entertainment. Not only is much art created in order to entertain—Shakespeare's plays, for example—but art that was religious or political in its origins is today valued largely for its entertainment value. The Homeric epics and the religious art of the Renaissance are examples. For those who actually love art it is primarily as a superior form of entertainment and consolation that it is loved rather than as a source of insight or edification, although it often is that as well. So as a classification for use in applying the First Amendment, "entertainment" is both underinclusive and overin-

clusive. It includes things that the First Amendment cannot possibly be thought to include (such as the northern lights) and it excludes things—namely, most of art—that it is the whole purpose of the classification to include.

Still, can the First Amendment really be thought to cover *all* expressive entertainment? The example of bullfighting comes to mind. Bullfighting is an expressive activity and even has affinities to the dance. There is music, pageantry, elaborate costumes, the march of the toreadors, the dance-like steps with which the matador incites and parries the bull, the picadors on their splendidly caparisoned prancing horses. The whole is orchestrated and choreographed for maximum emotional impact; among the feelings conveyed are grace, courage, suffering, fear, beauty, cruelty, splendor, and *machismo*. Hemingway, Death in the Afternoon (1932). Bullfighting is more expressive, more artistic, culturally richer than the most popular American sports. Is it therefore protected by the First Amendment? It is not; the First Amendment no more forbids the prohibition of bullfighting than it does the prohibition of obscenity. There are many grounds for regulating and even prohibiting particular forms of expressive activity. In the case of bullfighting, the grounds are aversion to mutilating or killing animals for sport and also aversion to sports that are highly dangerous to the (human) participants. The Constitution does not place freedom of expression above all other values; it does not privilege gladiatorial contests any more than it privileges the employment of children to make pornographic movies. Nevertheless when government suppresses bullfights it is not suppressing mere "entertainment" that has little in common with ballet. They have a great deal in common. The difference between bullfighting and ballet has nothing to do with expressiveness; they are equally expressive, albeit of a different range of emotions. The pertinent difference is that ballet does not entail the torture and killing of animals or a high risk of injury or death to the dancers, and bullfighting does.

In calling bullfighting "expressive" I may seem to be implying, despite my disclaimer, that bullfighting *must* be protected by the First Amendment from regulation or suppression; for does not the amendment protect freedom of expression? I repeat that I do not believe that the First Amendment protects bullfighting. But I insist that bullfighting is an expressive activity. To deny this would be to play the unedifying semantic game of persuasive definition. Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value.

I said earlier that casual chit-chat, although an expressive activity, is not protected by the First Amendment. A public theater that ejects a patron for talking to his neighbor during the performance of a play does not commit a prima facie violation of the First Amendment. Perhaps, like casual social conversation, the striptease makes so little contribution to the marketplace of ideas that it can be suppressed even though it is an expressive activity formally akin to the highest forms of art. But here we risk being misled by metaphor. "Marketplace of ideas," useful short-hand though it is for the domain of the First Amendment, leaves out not only nude dancing but also the greater part of art, as well as much of politics, of journalism, of education, of philosophy, of law, and in short of nonscientific discourse generally, for such discourse is heavily rhetorical, emotive. To observe that ordinances forbidding nude dancing in bars "do not prohibit an exchange of ideas which might tend to bring about political or social change," *Yauch v. State*, 109 Ariz. 576, 579, 514 P.2d 709, 712 (1973), or that "it is difficult to conceive of ideas entitled to First Amendment protection which can be solely—or even best—expressed by baring the anus or genitals," *Kew v. Senter*, 416 F. Supp. 1101, 1105 (N.D. Tex. 1976), is correct; it just misses the point. Art and popular entertainment are not awkward or failed attempts to communicate ideas, and the protection of the First Amendment is not limited to ideas.

Once the relevant marketplace is understood to include expressive activity concerned with the emotions as well as expressive activity concerned with ideas—to include narrative, imagery, rhetoric, and design, as well as discursive prose—it becomes evident that erotic performances are a major component of the First Amendment marketplace, while social conversation, ballroom dancing, and other "audience of one" communicative activities are a minor component. Granted, the suppression of one genre of erotic art, the striptease, would not truncate the marketplace greatly. But lest its suppression turn out to be the first step on the road back to the institutionalized puritanism of Cromwell's reign—during which all theatrical performances, including performances of Shakespeare's plays, were prohibited—we need a principled ground for distinguishing the striptease (or some subcategory of striptease typified by the dances at the Kitty Kat Lounge) from other forms of nonobscene erotic expression. None has been suggested. At argument, the lawyer for the State of Indiana proposed to limit the protected category to "established" works of art. This approach would have excluded Manet's great work *Déjenuer sur l'herbe*, in which a naked woman is depicted picnicking with two fully clothed men; far from being an established work of art when it first burst on the art scene in 1863, it caused a scandal.

Although much of today's high culture began as popular entertainment, the likelihood that the videotape of the Kitty Kat stripteases will one day achieve the cultural renown of *Déjeuner sur l'herbe* is vanishingly close to zero. Anyone who doubts this is carrying relativism and skepticism too far. But aesthetic quality cannot be the standard that judges use to determine which erotic performances can be forbidden and which cannot be. There are no objective standards of aesthetic quality, and while we allow obscene works to be "redeemed" by "evidence" of aesthetic quality, it hardly follows that we should allow works that are not obscene to be condemned on the basis of evidence suggesting a lack of aesthetic quality. On the contrary,

the fact that the law protects obscene *art* attests to a justified modern anxiety about censorship. The practical effect of letting judges play art critic and censor would be to enforce conventional notions of "educated taste," and thus to allow highly educated people to consume erotica but forbid *hoi polloi* to do the same. The robust paternalism and class consciousness that once permitted such a distinction have lost their legitimacy. The music held constitutionally protected in *Reed v. Village of Shorewood* was rock and roll. The Constitution does not look down its nose at popular culture even if its framers would have done so. *Salem Inn, Inc. v. Frank*, 522 F.2d 1045 (2d Cir. 1975). "[T]he taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change." *Bleistein v. Donaldson Lithographing Co.*, *supra*, 188 U.S. at 252. As applied by the district court in this case, the Indiana statute with its judge-made exception for "expressive" nudity discriminates between upper-class and lower-class nonobscene erotica. The First Amendment forbids this kind of discrimination.

I have been assuming that the line between expressive (in the sense of communicative) activity and nonexpressive activity is distinct. It is not. Wright, *supra*, at 166-68. There are some clearly expressive activities and some clearly nonexpressive ones but there is also a vast gray area populated by street performers who swallow swords or walk on glowing coals or guess people's ages or weights, by people who wish to make a "statement" by dressing outlandishly, by creators of video games, by contestants in dance marathons, and so on without end. The government has a greater scope for regulation in the gray area. Maybe, indeed, that area could be regarded as outside the boundaries of the First Amendment (*de minimis non curat lex*), in which event the only constitutional constraints would be those very loose ones that the due process clause places on harmless liberties not involving the exercise of freedom of expression. *Swank v. Smart*, *supra*, slip op. at 5-7. In claiming that expression is a continuum

I am not contending that the boundaries of the First Amendment must be left utterly elastic. It is desirable to have some First Amendment rules and not leave everything to be governed by standards and sliding scales. Put more precisely, standards and sliding scales can be used to precipitate out rules, and have been used in this way. The rule that social dancing is not an activity protected by the First Amendment, and the rule that social conversation is not, are crystallizations of a process of weighing the relevant policies and values to determine the amendment's appropriate scope. Another sensible First Amendment rule might be that government has carte blanche to regulate dangerous sports, irrespective of the expressive content of some of those sports; that would take care of bullfighting. There may be room for rules about public nudity as well. What is indefensible is to set up "entertainment" as a category of activities, distinct from "art," that government can regulate without regard to the First Amendment. Or to suppose—unless one is prepared to deprive most art of constitutional protection—that there is a rational conception of "expression" that places striptease dancing on the nonexpressive side of the divide.

4. If the line between the expressive and the nonexpressive is indistinct, the "line" between speech and conduct, between live performances and performances on paper, videotape, or compact disc, is a blur. (This case is a symphony of sterile dichotomies.) Normally, although not always, the medium in which experience is encoded is irrelevant to its expressive character and social consequences. The pitter-patter of raindrops does not become expressive activity by being recorded, and a recording of Beethoven's Ninth Symphony is not entitled to more constitutional protection than the live performance from which the recording was made. The government could not shut down the theaters on the ground that what actors do is conduct, not speech, with the result that a production of *King Lear* by the Royal Shakespeare Company would be outside the

scope of the First Amendment but a nonobscene pornographic movie within it.

There are exceptions to the parity of the live and the canned performance. A murder intended as a political demonstration is illegal; a movie in which a murder is simulated is not. The reason is not that one is conduct and one speech, but that the conduct involved in the two performances is different. In the first, a person is killed; no one is killed or injured in the second. It is on this theory that child pornography, even if not legally obscene, can constitutionally be suppressed. *New York v. Ferber*, 458 U.S. 747 (1982); *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469-70 (U.S. April 18, 1990). Speech is suppressed in order to get at the underlying conduct, the employment of children to make pornography. So might a state prohibit photographs of sex acts performed by persons paid to perform them; speech would be suppressed to get at the underlying conduct, a variant of prostitution. *People v. Freeman*, 46 Cal. 3d 419, 758 P.2d 1128 (1988); *State v. Kravitz*, 511 P.2d 844 (Ore. App. 1973). The striptease dancers in our case are not children and are not engaging in sex acts, and although it might be possible to distinguish between live and canned nude dancing on the ground that in the former the dancers are accessible to the audience, Indiana has disclaimed any such distinction as a basis for upholding its statute.

The true reason I think for wanting to exclude striptease dancing from the protection of the First Amendment is not any of the lawyers' classification games that I have been discussing, such as expression versus nonexpression, ideas versus emotions, art versus entertainment, or speech versus conduct. It is a feeling that the proposition, "the First Amendment forbids the State of Indiana to require striptease dancers to cover their nipples," is ridiculous. It strikes judges as ridiculous in part because most of us are either middle-aged or elderly men, in part because we tend to be snooty about popular culture, in

part because as public officials we have a natural tendency to think political expression more important than artistic expression, in part because we are Americans—which means that we have been raised in a culture in which puritanism, philistinism, and promiscuity are complexly and often incongruously interwoven—and in part because like all lawyers we are formalists who believe deep down that the words in statutes and the Constitutions mean what they say, and a striptease is not a speech. But the element of the ridiculous is not all on one side. Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires? (These statutes are full of absurd locutions, such as: " 'Wholly or substantially exposed to public view,' as it pertains to breasts, shall mean. . . ." Chattanooga Ord. No. 7420, § 25-28.2(b), quoted in *City of Chattanooga v. McCoy*, *supra*, 645 S.W.2d at 401.) Most of us do not admire the Islamic clergy for their meticulous insistency on modesty in female dress. Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting. The history of censorship is a history of folly and cruelty.

Some two-party transactions have effects on third parties, and these effects are a proper object of public concern. Nonobscene displays of nudity can have such effects. *Piarowski v. Illinois Community College Dist. 515*, 759 F.2d 625 (7th Cir. 1985), held that a public college could move an offensive although not obscene artistic display to a more discreet location where the display would not thrust itself on the unwilling viewer. Indiana can forbid the Kitty Kat Lounge to display photographs of its nude dancers on its marquee. But it cannot ban the dancing itself (when performed indoors, and not visible from the street) without a stronger showing of justification than it has attempted. Indeed, it has attempted none—which brings me to the brief and argument of the State of Indiana.

The brief is four and one-half double-spaced pages in length, and is replete with grammatical and typographical errors. It contains no explanation of the evil at which the statute is aimed, and its analysis of the constitutional question is limited essentially to the following passage: "Entertainment which did not contain expressive content—e.g., cockfighting or bear-baiting—could presumably be regulate [*sic*] or prohibited by the States. Entertainment per se is not protected; entertainment that is a form of expression is." It is not obvious, however, that just because people can be forbidden to incite animals to kill each other, striptease dancers can be forbidden to remove all their clothing. There is a missing link between blood sports and erotic dancing that the brief does not attempt to supply. A psychiatrist might find the juxtaposition fascinating.

Asked at argument to explain the concern behind the statute—a pertinent question because there is no legislative history, and the Indiana decisions interpreting the statute do not explain its purpose beyond vague references to public decency—the state's lawyer first suggested that the purpose might be the protection of marriage. But recalling the divorce rate in this country he quickly added that *that* battle had already been lost and he switched his ground to the prevention of adultery. This is farfetched and was not elaborated.

A related and more plausible concern that may lurk behind the statute is fear that striptease dancing in bars stimulates or facilitates prostitution. (Is the Kitty Kat Lounge in the red-light district of South Bend? Does South Bend *have* a red-light district? The record is silent on these questions.) The association between erotic dancing and prostitution goes back to Roman times; bump-and-grind dancing is said to have originated in the bordellos of the Wild West; and in *California v. La Rue*, 409 U.S. 109, 111 (1972), the Supreme Court, in upholding under the Twenty-First Amendment a California statute restricting nude dancing, cited evidence that nude dancing in

California bars had encouraged prostitution and other lewd conduct. See also *United States v. Muskovsky*, 863 F.2d 1319, 1321 (7th Cir. 1988); *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 950-51 (11th Cir. 1982). The State of Indiana has never mentioned this evidence, however, let alone presented its own. Anyway the Indiana statute is not confined to bars. Although thus far I have discussed only the dancing at the Kitty Kat Lounge, because that is the only dancing that was videotaped for this case, the other plaintiff, Glen Theatres, owns a theater rather than a bar. The statute has been held to apply to theaters as well. *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), reversing 463 N.E.2d 1121 (Ind. App. 1984). If it were confined to establishments where liquor is sold, Indiana could appeal to the broad regulatory powers that states enjoy by virtue of section 2 of the Twenty-First Amendment, which forbids the transportation of alcoholic beverages into any state in violation of the state's laws. *California v. La Rue, supra*; *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam); *Reed v. Village of Shorewood, supra*, 704 F.2d at 950-51. The Supreme Court of North Dakota relied on that amendment in upholding an ordinance forbidding *all* dancing in places where liquor is served. *Olson v. City of West Fargo*, 305 N.W.2d 821, 827 (N. Dak. 1981).

Why the Twenty-First Amendment, the aim of which was to repeal Prohibition without eliminating state authority over the sale of liquor, should be thought to curtail the scope of the First Amendment is an abiding mystery of constitutional interpretation. The question is foreclosed at our level of the judiciary, however, and may in any event have little practical significance. For even if there were no Twenty-First Amendment, government would have greater scope for regulating expressive activity in bars than in theaters without violating the First Amendment. The audience is smaller, attentiveness is less, the expressive element diluted, and in short the social costs of restriction are lower. There are indications that the

Supreme Court would be receptive to a ruled based on such distinctions, *California v. La Rue, supra*, 409 U.S. at 118; *New York State Liquor Authority v. Bellanca, supra*, 452 U.S. at 722-23 (Stevens, J., dissenting), despite the social, cultural, and even political importance of cabaret entertainment. Segel, Turn-of-the-Century Cabaret (1987). And while in one sense the Indiana statute imposes an outright ban on an expressive activity rather than merely regulating it, in another sense the statute is a mere, and indeed modest (pun intended), regulation. The statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny "pasties" and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of the time, place, and manner of expressive activity are treated more leniently than outright bans.

But set to one side this question of which pigeonhole to put the statute in; it is another example of the frequent sterility of efforts at legal classification. Cf. *Community for Creative Non-Violence v. Turner*, 893 F.2d 1387, 1398-99 (D.C. Cir. 1990) (concurring opinion). Instead consider the issue in functional terms. The incremental expression associated with the movement from practical nudity to statutory nudity may well be slight, and the association of nude barroom dancing with prostitution may be a good enough reason for outlawing that increment to tip the balance in favor of a rule prohibiting nude dancing in bars but not in theaters, where the performers do not mingle with the customers. But that is not the approach of the Indiana statute. The statute does not distinguish between bars and theaters, and this omission, taken with the failure of the state in its briefs or at argument to mention prostitution, should make one skeptical that anxiety about prostitution is what animates it. Moreover, it is the striptease itself that the district judge found not to be expressive activity, not just the final step of

baring all. I add that despite the appeal of incremental analysis in this as in other settings, it would violate the First Amendment to require museums to place figleaves and brassières on their paintings and statues. Perhaps the Indiana statute effects a parallel mutilation of striptease dancing.

If we were dealing with a local ordinance, or a state statute authorizing local ordinances, the case for regulation would be strengthened. Even if one accepts the current view that the Fourteenth Amendment makes the prohibitions of the First Amendment fully applicable to the states and its subdivisions, the geographical scope of a restriction on expressive activity bears on the reasonableness of the restriction. Prostitution is a local problem, so the case for banning nude dancing in bars in order to reduce the incidence of prostitution will be stronger or weaker depending on local conditions. Moreover, an ordinance is less restrictive than a statute. It not only affects fewer people (on average—for of course there are some cities that are more populous than some states); it restricts them less. It is cheaper to travel to a nearby town for erotic entertainment than to another state.

In sum, while a *local* ordinance forbidding nude dancing and other nude performances in *bars* would be constitutionally unproblematic (nonexpressive public nudity in bars as in other places would fall under the legitimate ban of the state's statute) and would take care of the only social problem plausibly associated with nude dancing, a statewide ban on such dancing, applicable to theaters as well as to bars, violates the First Amendment. It is not saved by an exception for expressive dancing, when the exception excludes striptease dancing, which is expressive whether or not one likes what is being expressed. The intermediate regulation would be a statewide statute forbidding nude dancing (and other nude performances) in bars only; such a statute would be constitutional by virtue of the Twenty-First Amendment as it has been interpreted.

Can the application of the statute to dancing in theaters as well as in bars be saved by reference to the "general effect" of a regulation that restricts speech incidentally? *United States v. Albertini*, 472 U.S. 676, 688-89 (1985). In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the issue was the legality of a regulation of the National Park Service that forbade sleeping over in a number of the parks managed by the Service, including Lafayette Park in Washington, D.C., opposite the White House. No one questioned the validity of the regulation as such, but it was argued that the First Amendment forbade enforcing the regulation against a group that wanted to sleep over in Lafayette Park in order to make a symbolic statement about the problem of homeless people. The Supreme Court upheld the enforcement of the regulation even though in the particular case the balance between the values of expressive "speech" and those of cleanliness and order may well have inclined in favor of speech. The Park Service was not required to make an exception for the Community for Creative Non-Violence. *Id.* at 296-97. By analogy it can be argued that the State of Indiana is not required to make an exception to its ban on public nudity merely because the persons clamoring for the exception wish to employ nudity as an element of expressive activity.

Albertini and *Clark* make clear that persons engaged in expressive activity have no constitutional entitlement to be exempted from laws of general applicability. Authors cannot claim an exemption from income tax or publishers an exemption from the labor laws. This result is sound; and while it may be in tension with the principle derived from the free-exercise clause of the First Amendment that government must accommodate its laws of general applicability to the special needs of religious minorities, *Sherbert v. Verner*, 374 U.S. 398 (1963); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136 (1987); *Wisconsin v. Yoder*, 406 U.S. 205 (1972), that principle is moribund

after *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). But the teachings of *Albertini* and *Clark* are inapplicable here. The regulations involved in those cases did not ban a particular form of expressive activity across the board but merely excluded it from certain public property (military bases in *Albertini*, certain public parks in *Clark*). And the harm to the policies behind the regulations was unaffected by the expressive character of the activities affected by them. In *Clark* for example, the damage to the parks was the same whether the sleepers were camping out for fun, were in fact homeless, or wished by sleeping in the park to make a symbolic statement on behalf of the homeless. In contrast, whatever interest Indiana is trying to safeguard by banning public displays of nudity is not harmed by theatrical—perhaps not even by nightclub—performances featuring nudity. The harm done to public order by a performance of *Salome* in which Salome ends the Dance of the Seven Veils clad only in a transparent body stocking and therefore nude under Indiana law—as in a performance last fall at the Lyric Opera in Chicago—is not of the same order of magnitude as the harm (in fright, disgust, or embarrassment), slight as it may be, caused by a person who runs down the middle of a busy street stark naked or urinates in an alley. Only in the latter cases does the concept of public decency supply a persuasive rationale for punishment.

The bearing of *Albertini* and *Clark* on the present case is in any event academic. The defendants have not attempted to defend the district court's decision on the ground that all that is involved here is a refusal by Indiana to make an exception to a general prohibition of public nudity; they have not cited *Albertini* or *Clark*; they have waived the point. We can with propriety affirm a district court's decision "on any ground that the record fairly supports and the appellee has not waived," *Martinez v. United Automobile Workers*, 772 F.2d 348, 353

(7th Cir. 1985); *LaSalle National Bank v. General Mills Restaurant Group, Inc.*, 854 F.2d 1050, 1052 (7th Cir. 1988), but the second condition is not satisfied here. "A point raised for the first time at oral argument, when the appellant is in no position to reply, comes too late. We do not allow an appellant to raise new issues in the reply brief; perforce the appellee may not raise new issues at oral argument." *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989) (citation omitted). The appellees here never raised the issue.

Furthermore, whether or not required to do so by the First Amendment, Indiana has carved an exception to its public-decency statute for expressive activity. By interpreting the exception narrowly and thus the statute broadly, the district judge made the statute discriminate against a particular form of expressive activity—the "low" form represented by striptease dancing. And this a state surely cannot do without a reason.

The points about waiver and about the state's interpretation of the statute are connected. We are not the authoritative interpreters of a state statute; the state is. The state supreme court, in *Baysinger*, and the state's highest law enforcement official, in this case, concur in interpreting the statute not as a blanket prohibition of public nudity (an interpretation that the words of the statute would support), but as a prohibition of nonexpressive public nudity. That interpretation binds us, and demonstrates that what the state is doing is singling out a particular form of erotic but not obscene nude performance for condemnation. We would be inconsistent in affirming the district court's decision out of respect for popular preferences and states' rights while disregarding the meaning imprinted on the statute by the state's judges and law enforcement officials.

At oral argument the lawyer for the state said that the statute applies not only to live performances whether in

theaters or in bars but also to movies with nude scenes, unless of course the movie is "expressive" in the sense in which "established" works of art are expressive. (Owners of movie theaters in Indiana, beware!) He added that if the strippers ended their dances in bathing suits rather than in the buff, this would not affect the First Amendment issue, because the striptease would still be mere conduct. *This* statute would not apply, because a woman in a bathing suit is not within the statute's definition of nudity; but the statute could be amended to take her in without violating the First Amendment. (So we could have morals police patrolling the streets of South Bend with knouts, like the Saudis.) Belly dancing, he added, could be banned, presumably on the same theory—it is not certified high art. He reassured us that the nude paintings that hang in museums are safe, although he would acknowledge only a limited acquaintance with such museums. Recent events in a state bordering on Indiana make one wonder how safe even museums will be if the spirit of censorship is allowed to flourish.

I do not argue that legislation, to be valid, must have some empirical basis or serve some utilitarian end. The modern state is not forbidden to interfere with transactions between consenting, competent adults merely because it is unable to show that third parties are harmed. The state is free to embody in legislation the moral opinions of its dominant groups, or for that matter of any group influential with the legislature—is free, therefore, to make hostility to nonmarital sex, disgust at public displays of nudity, revulsion at vulgar erotic entertainment, and embarrassment at public displays of nudity premises of state action even though it is difficult to ground these moralistic emotions in pragmatic social concerns. Anxiety about nudity has deep roots in Christian thought, Brown, The Body and Society: Men, Women and Sexual Renunciation in Early Christianity 249, 437-38 (1988), and the roots of our culture are Christian. Hostility to public nudity may even be connected with concepts of dignity and

equality that are central to our political and social institutions. *Id.* at 316-17. But the state is free to act upon the moral preferences of the majority only up to the limits set by the federal Constitution. Those limits are not the sky when the activity restricted by state legislation is expressive activity in a sense that I believe encompasses erotic dance performances in general and the striptease in particular. The state can forbid nude dancing in bars if it acts under the Twenty-First Amendment, but if as here it wants to restrict such activity in all public establishments, whether or not they serve liquor, it needs a reason. *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985). It has offered none. Cf. *Mickens v. City of Kodiak*, 640 P.2d 818 (Ala. 1982).

Indiana's law enforcement authorities have been backed into an untenable position by the glosses that the courts of Indiana have placed on the statute, and are signaling to us by carefree advocacy their indifference to whether the statute survives or is struck down. (I *think* that is what they are doing, but I may be mistaken; the state did, after all, go to the bother of asking the full court to rehear the case.) In the America of 1990 the project of stamping out nude striptease dancing is quixotic. The power of government is relative to the desires and values of its people. The State of Indiana cannot take the erotic edge off American culture. I doubt that it is even trying to do so. But the sincerity of its concerns is easily tested. If the state is seriously concerned with the social consequences of nude barroom dancing, and does not trust its municipalities to deal adequately with the problem, it will amend its public-indecency statute to prohibit nude dancing in establishments that serve liquor. Such an amendment would be valid by virtue of the Twenty-First Amendment and would moot the questions that divide this court.

COFFEY, *Circuit Judge*, dissenting. The majority holds that the First Amendment forbids the State of Indiana from applying its prohibition on public nudity to nude dancing since "Indiana's attempt to ban nude dancing in pursuit of its [interest in public morality] is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse." Majority Opinion at 14. The majority reaches this result in spite of the fact that the plaintiff dancers made a clear and unambiguous statement that they were not attempting to convey either "a larger political or ideological statement" and furthermore the district court made a specific finding that the dancers' conduct was "not expressive activity." Further, as the majority admits, a state may "regulate expressive conduct for reasons unrelated to the suppression of speech," Majority Opinion at 15, and "may establish reasonable time, place and manner restrictions on protected expression." *Id.* The Indiana public nudity statute's application to the plaintiffs' nude dancing, like its application to any other form of public nudity, implements the state's interest in public morality, a legitimate and praiseworthy goal unrelated to speech and constitutes a valid regulation of the manner of any speech that allegedly inheres in the plaintiffs' nude dancing. I dissent.

Through the analytical vehicle of the "living constitution," the judiciary has all too frequently permitted the favored "rights" of particular individuals and groups to override a legislative majority's expression of the common good. Our society has evolved from one espousing strict moral standards to a rather uninhibited one. Under the flag of social and sexual individual freedom, advocates of such causes as the sexual revolution have utilized the judicial system to implement their Freudian vision of a society delivered from the legacy of repressed sexuality. Alleged First Amendment rights to the production and dissemination of sexually oriented tapes and books as well as substantive due process rights in the area of abortion, one of the most politically divisive questions of our time,

are a few of the currently recognized "constitutional" rights that would have proven very difficult to obtain through the popularly elected legislative branch. These developments certainly have led to the progressive disruption of the basic moral tenets that have held our communities together for centuries. Unsuccessful efforts at judicial expansion of constitutional rights, such as the failed attempt to erect a constitutional right to homosexual sodomy in *Bowers v. Hardwick*, 478 U.S. 186 (1986), testify to the persistent attempts to make use of the judiciary and the device of a "living constitution" to create a moral structure at odds with our Judaeo-Christian heritage. Indeed, an observer can discern from Justice Blackmun's dissent in *Hardwick* an attempt to develop a theoretical constitutional right "independently to define one's identity"[1] that would have, in essence, forbidden legislative action on any moral issue that could loosely be characterized as "victimless" (involving no clearly established damage to persons other than those who engaged in the activity). As the Supreme Court properly observed in rejecting this type of expansive jurisprudence in its majority opinion in *Bowers*: "The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." 478 U.S. at 194. Obviously, the framers of the Constitution and of the post-Civil War constitutional amendments never contemplated the type of "living" interpretation this document has received, including the present attempted recognition of constitutional protection for nude dancing. These individuals, who came from eras in which persons were fully clothed in public, certainly never contemplated, much less even dreamed, that the Constitution might someday be utilized as an instrument to promote nude dancing. What they had in mind when they left England for this country was the protection of religious exercise, freedom of press

[1] *Bowers*, 478 U.S. at 205 (Blackmun, J., dissenting), quoting *Roberts v. United States Jaycees*, 468 U.S. 608, 619 (1984).

and debate, not the expansion of a so-called "living constitution" to create a climate of moral permissiveness.

I am not one of those who believes that it is the role of the federal courts, through the creation of a "living constitution," to, in effect, establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judaeo-Christian principles and heritage. Expansive constitutional interpretation, centering upon the issue of expression in a case where the plaintiffs have disavowed any intention to communicate a "larger political or ideological statement" must not become a tool for a federal court to substitute the moral views of a more vocal minority for those of the majority of the people of the State of Indiana acting through their democratically elected representatives. If at all possible, the courts should give effect to the will of the people, even when it means upholding laws that express moral viewpoints that reflect a conception of the common good that may not be shared by segments of a vocal, so-called intellectual minority. This fact was most emphatically recognized in Chief Justice Rehnquist's opinion in *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989), where the Supreme Court considered the legitimacy of state legislation pertinent to abortion, one of the significant issues of our day:

> "The dissent . . . accuses us, *inter alia*, of cowardice and illegitimacy in dealing with 'the most politically divisive domestic legal issue of our time.' There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of cases such as *Colautti v. Franklin*, 439 U.S. 379, 99 S. Ct. 675, 58 L. Ed. 2d 596 (1979), and *Akron v. Akron Center for Reproductive Health, Inc.*, *supra*. But the goal of constitutional adjudication is surely not to remove inexorably 'politically divisive' issues from the ambit of the legislative process, whereby the people through their elected representatives deal with matters of concern to them. The goal of constitutional adjudication is to hold true the balance between that which

> the Constitution puts beyond the reach of the democratic process and that which it does not. We think we have done that today. The dissent's suggestion that legislative bodies, in a Nation where more than half of our population is women, will treat our decision today as an invitation to enact abortion regulation reminiscent of the dark ages not only misreads our views but does scant justice to those who serve in such bodies and the people who elect them."

(Citations omitted).

I agree with the description of the judiciary's proper role expressed in Chief Justice Rehnquist's opinion. In the context of nude dancing, no less than in the contexts of abortion and other important questions of present concern, we are required to permit the people of each state to establish, through their democratically elected representatives, the moral climate in which they choose to live and raise their children. A state might well prefer a lifestyle that tolerates and perhaps even welcomes public nudity such as the likes of Las Vegas, San Francisco and others. So be it. People who seek this lifestyle are free to live in areas that cater to this moral climate. But many states, such as the State of Indiana, obviously wish a more wholesome lifestyle. If it so chooses, that state, through its duly elected representatives, should be entitled to create a cultural, ethical and moral environment above that which panders to the basest sexual appetites of human beings. Their right to select this type of environment should not be infringed upon, just as we would not infringe upon the right of other states to choose a more permissive environment. Community standards are a recognized part of the determination of whether dance is considered obscene and unprotected under the First Amendment. *See Miller v. California*, 413 U.S. 15, 24 (1973) ("The guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . ."). They would seem

no less relevant to the issue of the legitimacy of restrictions on conduct unrelated to speech (i.e., nudity). Accordingly, it is important that we recognize that states and local communities through their legislative bodies are responsible for the establishment of moral standards that reflect their conception of the common good. It is not our role to elevate the interests of a few individuals, thereby stifling the will of the majority. For example, in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), the Court recognized the need to balance the interests of park users desiring highly amplified sound and park users who did not, rather than simply elevating the constitutional interests of the few over those of the majority, stating: "The City enjoys a substantial interest in ensuring the ability of its citizens to enjoy whatever benefits the city parks may offer, from amplified music to silent meditation." *Ward*, 109 S. Ct. at 2757. Similarly, in upholding the strong interest of the majority of the people of Ohio in eradicating child pornography, the Supreme Court held that: "Given the gravity of the State's interests in this context, we find that Ohio may constitutionally proscribe the possession and viewing of child pornography," *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4470 (U.S. April 18, 1990), and noted that this action was distinguishable from its earlier decision in *Stanley v. Georgia*, 394 U.S. 557 (1969), that recognized a right to privately possess adult, rather than child, pornography and obscene materials because *Stanley* itself recognized that " 'compelling reasons may exist for overriding the right of the individual to possess [certain statutorily prohibited] materials.' " *Osborne*, 58 U.S.L.W. at 4469 (quoting *Stanley*, 394 U.S. at 568 n.11).[2]

[2] In *Osborne* the Court believed this measure was necessary "because much of the child pornography market has been driven underground; as a result, it is difficult, if not impossible, to solve the child pornography problem by only attacking production and distribution." 58 U.S.L.W. at 4469. The Court also noted that "[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who possess and view the product, thereby decreasing demand." *Id.*

It is self-evident that Indiana's public nudity statute is motivated by that state's legitimate concern for public morality. Both the majority opinion and Judge Posner's concurrence complain of the absence of legislative history accompanying the passage of the statute. *See* Majority Opinion at 14 ("Regrettably, Indiana does not record the legislative history of its statutes"); Posner concurrence at 39 ("Asked at argument to explain the concern behind the statute—a pertinent question because there is no legislative history . . . ."). But resort to legislative history to determine a legislature's intent in enacting a statute is unnecessary when the intent is clear from the statute's terms. As we recently stated in *Trustees of Iron Workers Local 473, Pension Trust v. Allied Products Corp.*, 872 F.2d 208, 213 (7th Cir. 1989):

> "The resort to legislative history was unnecessary . . . because the statute is clear and unambiguous. *See Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1547, 79 L. Ed. 2d 891 (1984) (where 'resolution of a question of federal law turns on a statute and the intention of Congress, we look first to the statutory language and then to the legislative history if the statutory language is unclear'). . . . [T]he clear language should be the guide to congressional intent. Discarding the plain language of a statute in favor of committee reports or other legislative history ignores the realities of the legislative process. The crafting of specific language often reflects legislative compromise reached after hard fought battles over the means to reach even common goals. *Courts should only reluctantly turn to legislative history for fear of upsetting the delicate balance reflected in a finally worded piece of legislation. In this case 'the plain language' of the statute 'is the best evidence of its meaning.' Meredith* [*v. Bowen*, 833 F.2d 650, 654 (7th Cir. 1987)]."

(Citations and footnote omitted, emphasis added).

The fact that public morality underlies Indiana's enactment of a public nudity statute is abundantly clear from

the very language of the statute. For thousands of years people in Western cultures have consistently worn clothing in public, even from the time Adam and Eve wore the first fig leaves or loin cloths. It should not come as a shock that the sincerely held, traditional moral beliefs of the people of Indiana, would result in the enactment of a statutory requirement providing that at least a minimal amount of clothing be worn in public. Indeed, no fewer than 37 states have similar laws that prohibit indecent or lewd exposure of particular body parts.

Not only is the interest in public morality the self-evident basis for Indiana's public nudity statute, it is also an interest the Supreme Court has recognized as a legitimate justification for state regulation of conduct. For example, in *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the Supreme Court rejected the notion that traditional interests in public morality were insufficient to justify a state's prohibition of homosexual sodomy. The Court observed:

> *"[R]espondent asserts that there must be a rational basis for the law [against sodomy] and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.* Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 states should be invalidated on this basis."

Bowers, 478 U.S. at 196 (footnote omitted, emphasis added). Similarly, Chief Justice Burger, in his concurrence in *Bowers* emphasized the legitimacy of traditional moral concepts as a basis for state regulation:

> "[T]he proscriptions against sodomy have very 'ancient roots.' Decisions of individuals relating to homosexual conduct have been subject to state intervention throughout the history of Western civilization. *Condemnation of those practices is firmly rooted in Judaeo-Christian moral and ethical standards. . . . To hold that the act of homosexual sodomy is somehow protected as a fundamental right would be to cast aside millenia of moral teaching.*
>
> *This is essentially not a question of personal 'preferences' but rather of the legislative authority of the State. I find nothing in the Constitution depriving a State of the power to enact the statute challenged here."*

Bowers, 478 U.S. at 196, 197 (Burger, C.J., concurring) (emphasis added).[3]

As well as improperly failing to recognize the legitimacy of Indiana's interest in public morality, the discussions of the state interest in "public morality" found in both the majority opinion and Judge Posner's concurrence demonstrate an inappropriately limited conception of this legitimate state interest. In belittling Indiana's interest in "public morality" Judge Posner states: "Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting." Posner concurrence at 38. Judge Posner's statement merely reflects differences in moral values among the population. Conduct that

---

[3] *Hardwick* severely undercuts the persuasive authority of the Eleventh Circuit's decision in *Krueger v. City of Pensacola*, 759 F.2d 851, 855-56 (11th Cir. 1985), cited in Judge Posner's concurrence. *See* Posner concurrence at 47. *Krueger* predated *Hardwick*, was decided by the same court of appeals whose judgment was reversed in *Hardwick*, and its rationale that traditional moral concepts cannot provide a legitimate basis for state legislation is certainly inconsistent with the respect for such concepts the Supreme Court expressed in *Hardwick*.

a more vocal minority considers to be the work of "busybodies" reflects the implementation of the less vocal majority's deeply held concerns and should be respected. Personally, I do not mind being labeled a "busybody" or a "prude" as I write to uphold the moral ethics, ideals and principles of the majority of the people of the State of Indiana speaking through their legislative representatives. In writing along these lines, I would add that neither others nor myself are paternalistic or wish to force our moral beliefs on society. We merely recognize the right of the people, and in this instance the populace, of the State of Indiana to implement their beliefs and conceptions of proper moral principles through their legislature. This right I believe must be respected.

Furthermore, when a state bars public nudity, including nude dancing, on the basis of its concern for public morality, it does not act as a "busybody." Rather, it acts to eliminate the real harm that can result from permitting public nude dancing. The interest in public morality that Indiana relied upon to enact its public nudity statute is based on the simple truth that nudity, while appropriate and beautiful in some contexts may also prove deeply offensive and harmful in other contexts. An artist oftentimes finds it necessary in his or her profession to make use of a nude model, and nudity in that case is free from indecent connotations. Certainly, any form of nudity whose purpose and manifestation is the arousal of sexual fantasies among groups or in public lacks any qualification for social acceptance. Public nudity clearly breaks down the acceptable social norms that have evolved from our Judaeo-Christian foundation. Most importantly, a real consequence of nude dancing is the loss of human dignity for the female performer and sometimes even those who observe the performance. Traditional values and morals, as are expressed in Indiana's prohibitions of public nudity, far from being instruments of puritanical repression, are means for establishing complete and healthy integration of the human personality and thus preserve the dignity

of each and every individual, the primary requirement for wholesome social interaction.

The clearest way in which nude dancing harms the performers, the audience and society in general is through the degradation of women that results from their treatment solely as objects for lustful male sexual passions and appetites. When a woman is stripped of her clothing in the presence of a throng of observing males, we undeniably underscore the notion that a woman exists solely for the sexual satisfaction of a controlling group of males. In *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 328-29 (7th Cir. 1985), *aff'd* 475 U.S. 1001 (1986), we noted the legitimacy of a city's concerns for the dignified treatment and respect for the female gender that motivated its adoption of anti-pornography legislation:

> "Indianapolis justifies the ordinance on the ground that pornography affects thoughts. Men who see women depicted as subordinate are more likely to treat them so. Pornography is an aspect of dominance. It does not persuade people so much as change them. It works by socializing, by establishing the expected and the permissible. In this view pornography is not an idea; pornography is the injury.

There is much to this perspective. Beliefs are also facts. People often act in accordance with the images and patterns they find around them. People raised in a religion tend to accept the tenets of that religion, often without independent examination. People taught from birth that black people are fit only for slavery rarely rebelled against that creed; beliefs coupled with the self-interest of the masters established a social structure that inflicted great harm while enduring for centuries. Words and images act at the level of the subconscious before they persuade at the level of the conscious. Even the truth has little chance unless a statement fits within the framework of beliefs that may never have been subject to rational study.

> Therefore, we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, '[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds].' IND. CODE § 16-1(a)(2)."

(Footnotes omitted). Although we invalidated the Indianapolis legislation involved in *Hudnut* on the basis of viewpoint discrimination, 771 F.2d at 325, there was a clear recognition that the government's concern for the degrading effects pornography has upon women was a legitimate and proper basis for legislative action. This recognition was corroborated in the Final Report of the Attorney General's Commission on Pornography:

> "An enormous amount of the most sexually explicit material available, as well as much of the material that is somewhat less sexually explicit, is material that we would characterize as 'degrading,' the term we use to encompass the undeniably linked characteristics of degradation, domination, subordination, and humiliation. *The degradation we refer to is degradation of people, most often women, and here we are referring to material that, although not violent, depicts people, usually women, as existing solely for the sexual satisfaction of others, usually men, or that depicts people, usually women, in decidedly subordinate roles in their sexual relations with others, or that depicts people engaged in sexual practices that would to most people be considered humiliating.* Indeed, forms of degradation represent the largely predominant proportion of commercially available pornography."[4]

In the related area of child pornography, the Supreme Court has recently observed that: " 'The legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child. That judgment, we think, easily passes muster under the First Amendment.' " *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 18, 1990) (quoting *New York v. Ferber*, 458 U.S. 747, 758 (1982) (footnote omitted)). In light of the harm nude dancing causes to the female gender, including the psychological damage to performers that is so frequently a byproduct, I see no reason why the will of the people, expressed in the legislative branch, should not be permitted to prohibit this activity and overcome an alleged First Amendment right that is based on a foundation of quicksand.

---

[4] Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 331-32 (1986) (emphasis added). The Attorney General's Commission went on to note that:

> "Although the category of the degrading is one that has only recently been isolated in some research, in the literature generally, and in public discussion of the issue, it is not a small category. If anything, it constitutes somewhere between the predominant and the overwhelming proportion of what is currently standard fare heterosexual pornography, and is a significant theme in a broader range of materials not commonly taken to be sexually explicit enough to be pornographic. But as with sexually violent materials, the extent of the effect of these degrading materials may not turn substantially on the amount of sexual explicitness once a threshold of undeniable sexual content is surpassed. The category therefore includes a great deal of what would not be considered to be pornographic, and includes a great deal of what would now be held to be legally obscene, but includes much more than that."

Id. at 334-35.

In my view the state's interest in protecting the welfare of its populace, including but not limited to the female entertainers, through a ban on nude dancing is both analogous to and more significant than the state's interest in animal welfare (prevention of the "torture and killing of animals") that Judge Posner would hold sufficient for the government to ban the allegedly expressive activity of bullfighting. Judge Posner notes that:

> "In calling bullfighting 'expressive,' I may seem to be implying, despite my disclaimer, that bullfighting *must* be protected by the First Amendment from regulation or suppression; for does not the amendment protect freedom of expression? I repeat that I do not believe that the First Amendment protects bullfighting. But I insist that bullfighting is an expressive activity. To deny this would be to play the unedifying semantic game called persuasive definition. Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value."

Posner concurrence at 33 (emphasis in original). In the same way, I believe that the degradation of women involved in nude dancing constitutes a "harmful consequence" of this activity that "outweigh[s] its expressive value" and would allow the state in its legislative wisdom to act "to destroy a market for the exploitative use of"[5] women.

Not only does nude dancing in and of itself degrade women, its elimination is particularly important because of its close association with a more devastating example of sexual exploitation of women, prostitution. The link between nude dancing, prostitution and other sexual crimes is well established. It is common knowledge that prostitution is a likely result in a situation where live performers

[5] *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 18, 1990).

sexually stimulate an audience and there often exists the probability of audience access to these performers for the performance of sexual activities. As Judge Posner notes: "The association between erotic dancing and prostitution goes back to Roman times [and] bump-and-grind dancing is said to have originated in the bordellos of the Wild West . . . ." Posner concurrence at 39. We need go no further than our own cases to discover that nude dancing and prostitution are partners coupled not only logically and historically but also in empirical, present-day reality. We can properly take judicial notice that in no fewer than three of our decisions in the past two years prostitution operations have been based in nude dancing establishments. *See United States v. Marren*, 890 F.2d 924, 926 (7th Cir. 1989) ("Michael's Magic Touch served alcoholic beverages and entertained patrons with nude female dancers who, when not performing on stage, solicited the club's patrons to engage in sexual activities in rooms located above the club"); *United States v. Doerr*, 886 F.2d 944, 949 (7th Cir. 1989) ("The prostitution activities . . . were concentrated in three businesses that . . . were nude dancing establishments. . . ."); *United States v. Muskovsky*, 863 F.2d 1319, 1322 (7th Cir. 1988) (Prostitution operation based in nude dancing establishment where customers were enticed to purchase "very expensive drinks . . . in exchange for sexual favors"). *See also* 1 J. Weinstein and M. Berger, *Weinstein's Evidence*, ¶ 200[03] and 200[04] (Setting forth requirements for taking judicial notice of "legislative facts"). Furthermore, in *California v. LaRue*, 409 U.S. 109, 111 (1972), now Chief Justice Rehnquist described the prostitution and other sexual activities accompanying nude dancing that motivated a ban on nude dancing in California:

> "Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers placed rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact be-

tween the mouths of male customers and the vaginal areas of female performers were reported to have occurred.

Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises."[6]

Thus, I agree with the observations of Justice Scalia that businesses, such as those that exhibit public nudity, are engaged in " 'the sordid business of pandering,' " *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 622 (1990) (Scalia, J., dissenting) (quoting *Ginzburg v. United States*, 383 U.S. 463, 467 (1966)), and that "[t]he Constitution does not require a State or municipality to permit a business that intentionally specializes in, and holds itself forth to the public as specializing in, . . . live human nudity." *Id.* Although Judge Posner does not believe that the Indiana statute follows this approach, even he notes that:

"The incremental expression associated with the movement from practical nudity to statutory nudity may well be slight, and the association of nude barroom dancing with prostitution may be a good enough reason for outlawing that increment to tip the balance in favor of a rule prohibiting nude dancing in bars but not in theaters, where the performers do not mingle with the customers."

[6] In addition, the prostitution activity that so often accompanies nude dancing most assuredly provides a basis for the infiltration of organized crime into a community. For example, the Attorney General's Commission on Pornography noted: "Michael Joseph Glitta, one of the two major pornography distributors in Chicago, and a lieutenant in the Accardo organized crime family, controlled a "strip joint" where numerous persons have been arrested for prostitution-related offenses." Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 1059 (1986).

Posner concurrence at 41. In any event, it is quite clear, even in the concurring judge's opinion, that a limitation on public nudity, applicable to nude dancing, could serve a legitimate and proper interest in public morality through its suppression of prostitution.

Nude dancing can also raise danger for innocent persons, particularly women, who often find themselves victimized by those who have witnessed such performances. Certainly there is a powerful state interest in preventing sexual assault. Nude dancing, through its excitation of male sexual passions, might very logically result in a sexual assault. The Attorney General's Commission on Pornography specifically noted a relationship between exposure to exhibitions or material that degraded women and rape and other forms of unwanted sexual aggression:

"[O]n the basis of all the evidence we have considered, from all sources, and on the basis of our own insights and experiences, we believe we are justified in drawing the following conclusion: Over a large enough sample a population that believes that many women like to be raped, that believes that sexual violence or sexual coercion is often desired or appropriate, and that believes that sex offenders are less responsible for their acts, will commit more acts of sexual violence or sexual coercion than would a population holding these beliefs to a lesser extent.

We should make clear what we have concluded here. We are not saying that everyone exposed to material of this type has his attitude about sexual violence changed. We are saying only that the evidence supports the conclusion that substantial exposure to degrading material increases the likelihood for an individual and the incidence over a large population that these attitudinal changes will occur. And we are not saying that everyone with these attitudes will commit an act of sexual violence or sexual coercion. We are saying that such attitudes will increase the likelihood for an individual and the incidence for a

> population that acts of sexual violence, sexual coercion, or unwanted sexual aggression will occur. Thus, we conclude that substantial exposure to material of this type bears some causal relationship to the level of sexual violence, sexual coercion, or unwanted sexual aggression in the population so exposed."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 333-34 (1986).

Although rape and other unwanted sexual attentions are the most direct manner in which uninvolved women may find themselves harmed from exhibitions of nude dancing, the vicious and deprecating attitudes toward women that are developed as a result of nude dancing have the effect of perpetuating many forms of improper discrimination against women. As the Attorney General's Commission on Pornography noted:

> "We need mention as well that our focus on these more violent or more coercive forms of actual subordination of women should not diminish what we take to be a necessarily incorporated conclusion: Substantial exposure to materials of this type bears some causal relationship to the incidents of various nonviolent forms of discrimination against or subordination of women in our society. To the extent that these materials create or reinforce the view that women's function is disproportionately to satisfy the sexual needs of men, then the material will have pervasive effects on the treatment of women in society far beyond the incidence of identifiable acts of rape or other sexual violence. . . . [W]e feel confident in concluding that the view of women as available for sexual domination is one cause of that discrimination, and we feel confident as well in concluding that degrading material bears a causal relationship to the view that women ought to subordinate their own desires and beings to the sexual satisfaction of men."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 334 (1986).

While public nudity, including nude dancing, offends public morality in each of the ways previously enumerated, it also can result in other significant harm to public morality. In addition to spawning sexually related crime, nude dancing establishments are frequently magnets for crime in general. The Attorney General's Commission on Pornography has noted:

> "For many people the harms caused by pornography relate in part to the effects on communities and neighborhoods of the establishments in which such materials are commonly sold. Whether it be a peep show, an 'adults only' pornographic theater, or a so-called 'adult bookstore,' there seems widespread agreement that virtually all such establishments are largely detrimental to the neighborhoods in which they are located. . . . [S]uch establishments are likely to exist in close proximity to areas in which prostitution exists, and in close proximity to establishments such as bars featuring live sexually oriented entertainment. As a result, most people would consider such establishments environmentally detrimental, and there is some evidence indicating correlation between crime rates and the particular neighborhoods in which such establishments exist."

Attorney General's Commission on Pornography, U.S. Department of Justice, *Final Report* 385-86 (1986). Indeed, the Supreme Court has explicitly permitted zoning regulations impinging upon adult-oriented establishments because of this type of undesirable effect upon the neighborhoods in which they exist, holding that such an "ordinance represents a valid governmental response to the 'admittedly serious problems' created by adult theaters." *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54 (1986). Furthermore, in an era where sexually transmitted diseases such as Acquired Immunity Deficiency Syndrome (AIDS) are prevalent, it would seem apparent that nude dancing establishments, and their common side effects of prostitution and other sexually related crimes, would offend public morality and public health through

their effect upon the incidence of fatal and near fatal sexually transmitted disease.

In his concurrence Judge Posner essentially argues that Indiana cannot rely upon the broad conception of public morality that I have just considered, because it failed to verbalize all of these interests in its briefs and oral arguments in the current litigation. I disagree. As we have just developed, a state's interest in public morality is a many faceted interest designed to protect the citizenry from the psychological and physical harm that can result from public nudity, including nude dancing. As we have also developed, a legislature's intent to rely upon this multi-faceted interest is obvious in the very passage of a statute barring public nudity. In particular, the relationship between nude dancing and prostitution is so common knowledge that it is unnecessary for the legislature to specifically mention this concern and the alleged lack of legislative history is hardly worthy of comment. There is no doubt that Indiana's attorneys would have little problem in spelling out the state's interest in public morality in greater detail before this court, a situation we frequently overlook under the guise of judicial economy. This same comment might very well be made concerning many advocates who appear before us. However, I am unconvinced that their failure to explain in minute detail every aspect of the broad concern for public morality that legitimately motivates a ban on public nudity, applicable to nude dancing, should require a holding that Indiana did not, in fact, rely upon such a broad conception of public morality. These concerns should be self-evident to an educated man or woman unless we are intent on creating a red herring. In this regard, I would note that the insistence upon detailed legislative expression of every reason for Indiana's public nudity statute is distinctly at odds with the use of the concept of a "living constitution" that clearly departs from the intention of the Founding Fathers. Certainly the Founders lived in a society where people generally remained fully clothed in public and would have never even dreamed that the

constitutional right to freedom of expression included a freedom to dance unclothed in public. Yet, while there is a clear willingness to utilize the concept of a "living constitution" to permit any form of arguably expressive conduct to obtain First Amendment protection, there is a contrasting outright reluctance to give the same latitude to the interpretation of the legislature's interest in public morality. Because it is so obvious that clothing is normally required in a modern society, a state must not be required to undergo the time-wasting effort of explaining each and every self-evident reason why it is desirable to have the populace wear clothing in order for it to implement its interest in public morality through a prohibition on public nudity applicable to nude dancing.

I respectfully disagree with the majority's reply that the State's interest in public morality is insufficient to permit the application of the public nudity statute to the plaintiffs' nude dancing because the State's advancement of its interest in public morality "must operate within the proscriptions of the First Amendment," Majority Opinion at 14, and "Indiana's attempt to ban nude dancing in pursuit of [this] interest is a forbidden interference and restraint because it seeks to withdraw this non-obscene and protected communication from the realm of public discourse." *Id.* (Footnote omitted).

We are concerned with an Indiana public nudity statute that has been declared valid on its face. *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *appeal dismissed for want of a substantial federal question*, 446 U.S. 931 (1980). In a previous opinion we recognized the *Baysinger* holding as authoritative for purposes of this litigation. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287, 288-90 (7th Cir. 1986). Thus, this is an "as applied" challenge where we are concerned *only* with the statute's application to the plaintiffs' activities. Therefore, we must "limit our analysis of the constitutionality of the [statute] to the concrete case before us," *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 803 (1984), and speculation concerning whether or not the state might enforce this stat-

ute if the routines were "choreographed as part of a graduate Ph.D. thesis," Majority Opinion at 11,[7] if the nudity was in a "movie," Posner concurrence at 46, or in "belly dancing," *Id.*, is simply irrelevant. I also am at a loss to understand the relevance in these proceedings of Judge Posner's complaints that a statute violates the Constitution when it impermissibly discriminates against "a particular form of erotic but not obscene nude performance." Posner concurrence at 45. While all of these concerns might have been relevant to the earlier facial challenges to the public nudity statute, at this juncture of the litigation when we consider a challenge to the application of the statute to the conduct of these dancers we are concerned only with the statute's actual enforcement history. It is great to engage in academic speculation and theorizing about hypothetically possible applications of the public nudity statute that might or might not improperly restrict protected expression, but such speculation is inappropriate at this juncture of the litigation. Where, as here, the only concrete example of enforcement of the statute contained in the record involves the conduct of the plaintiffs, we are limited solely to consideration of whether their activities are constitutionally protected from the prohibition of public nudity contained in Indiana's facially valid statute. *See Vincent*, 466 U.S. at 803.[8]

---

[7] Obviously if a dance was part of a graduate Ph.D. thesis, it would be accompanied by written argument (reasoning) explaining the ideas the dance conveyed, thus coming within the parameters of the First Amendment (expression). The expression involved in that situation contrasts sharply with our case where the dancers have, in my opinion, neither exhibited nor contended that their activities were intended to express any idea at all. *See* p. 71, *infra*.

[8] Applying "as applied" analysis, it would appear arguable that J. R.'s Kitty Kat Lounge and the dancers who appear there have no constitutional claim because their conduct was constitutionally unprotected since they attempted to conduct their nude dancing in a state-licensed bar serving alcoholic beverages in which nude

(Footnote continued on following page)

I agree with Judge Easterbrook's dissent in Section I wherein he considers how the application of Indiana's public nudity law to the nude dancing present in this case constitutes a permissible regulation of allegedly expressive conduct for reasons unrelated to speech and properly concludes that "laws against public nudity apply even if someone wishes to use nudity as an input into an expressive performance." Easterbrook dissent at 84. As explained hereafter, I also am convinced that Indiana's public nudity statute, which implements Indiana's legitimate interest in public morality, is a valid regulation of the dancer's conduct and of the *manner* of expression allegedly inherent in this activity.[9]

Indiana's public nudity statute is a restriction on the manner in which persons appear in public in the State of Indiana, applicable in public parks, streets and buildings, whether or not the involved individuals are engaged in allegedly expressive activity. The statute is similar to an indecent exposure prohibition and its very language makes clear that it is neither aimed toward nor limited to nude dancing, but rather prohibits nude dancing among other forms of indecent exposure such as "mooning," topless sunbathing, bottomless poetry recitation and any other activity, expressive or non-expressive, that results in public nudity. As even Judge Posner observes in his concurrence:

---

[8] *continued*

dancing could be completely banned under the twenty-first amendment. *See City of Newport v. Iacobucci*, 479 U.S. 92, 95 (1986) (per curiam) (State "regulatory authority [under the Twenty-First Amendment] includes the power to ban nude dancing as part of a liquor license control program"). It is unnecessary to consider this possibility, however, because the Indiana public nudity statute can legitimately ban the nude dancing of all of the plaintiffs.

[9] This result is not surprising in light of the Supreme Court's recognition that the "standard of *United States v. O'Brien*, 391 U.S. 367 (1968), for validating a regulation of expressive conduct, . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984).

> "The [public nudity] statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny 'pasties' and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of the time, place, and manner of expressive activity are treated more leniently than outright bans."

Posner concurrence at 41 (emphasis in original). The Supreme Court has made clear that

> "even in a public forum the government may impose reasonable restrictions on the time, place, or *manner* of protected speech, provided the restrictions 'are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.' "

Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (emphasis added)).

In applying the legal test applicable to a time, place or manner regulation, we begin with the question of whether the State's application of its public nudity statute to the plaintiffs is content neutral. The Supreme Court has stated:

> "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys. The government's purpose is the controlling consideration. A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others. Government regulation of

> expressive activity is content-neutral so long as it is '*justified* without reference to the content of the regulated speech.' *Community for Creative Non-Violence, supra*, 468 U.S. at 293, 104 S. Ct. at 3069 (emphasis added)."

Ward, 109 S. Ct. at 2754 (citations omitted).

The majority asserts that Indiana's application of its public nudity statute in furtherance of its goal of promoting public morality is not content neutral because: "In meeting this intended goal [public morality], the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision." Majority Opinion at 15, n.7. The majority's statement is factually inaccurate because not one of the plaintiffs has ever asserted that her conduct was intended to convey any message, much less a message in opposition to the State of Indiana's vision of public morality. Section II-A of Judge Easterbrook's dissent effectively demonstrates that the district court determined that one dancer's true purpose was not to express any idea but "to try to get customers to like her so that they will buy more drinks later," while one other dancer featured an act with "no choreography," and was paid based upon "the number of drinks purchased." Easterbrook dissent at 85. As the counsel for one of the dancers stated at oral argument, and as Judge Easterbrook notes in his dissent:

> *"[T]here is not a larger political or ideological statement being made. I do not contend for a second that this is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in Schad, that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said."*

Easterbrook dissent at 85 (emphasis added). Indeed, the questionable nature of any constitutional protection for any form of nude dancing was emphasized in the Sixth

Circuit's recent opinion in *Wal-Juice Bar, Inc. v. Elliott*, No. 88-3684 (6th Cir. April 5, 1990) (available on Westlaw at 1990 WL 37343), where the court observed that "the outright ban of nude dancing permitted under [*City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam)] and [*New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981) (per curiam)][10] rather plainly indicates that nude dancing is not a fundamental right entitled to heightened scrutiny under the due process clause." *Wal-Juice Bar*, Westlaw Printout at 12. This is a view that contrasts with that of the majority herein. The district court found that the dancers' conduct was "not expressive activity," and as I understand the law, we are bound to sustain district court findings of fact unless clearly erroneous. Federal Rule of Civil Procedure 52(a). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985). Similarly, "[w]hen there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574. Thus, in light of the plaintiffs' counsel's clear statement that they were not communicating "a larger political or ideological statement," and the trial court's finding that the dancers' conduct "was not expressive activity," I am at a loss to understand how the majority can elect to come under the ever expanding umbrella of the "living constitution," cast aside the "clearly erroneous" standard of review, reach the conclusion that the plaintiffs sought to convey a message that opposed Indiana's concept of public morality and create another new and glorious First Amendment protection.

[10] Both *Iacobucci* and *Bellanca* were cases in which the Supreme Court recognized under the Twenty-First Amendment to the Constitution a broad state power to control nude dancing in establishments that served alcohol.

In the final analysis, however, it does not matter whether or not the plaintiffs sought to convey a message of opposition to Indiana's concepts of public morality. Indiana's public nudity statute is intended solely to ensure that neither expressive nor non-expressive conduct violates public morality, an interest wholly unrelated to the suppression of speech. The State of Indiana does not seek to muzzle the message of disagreement with its moral vision. The plaintiffs remain free to express opinions or to perform dance movements that would reflect their opposition to Indiana's vision of public morality. All Indiana requires is that in expressing any message they desire to convey, the plaintiffs abide by a requirement of wearing a minimal amount of clothing and covering that must be obeyed by both those who express opinions favoring and those who express opinions opposing the State's interest in public morality.[11] The Supreme Court has recently decided that the First Amendment does not compel an exemption from generally applicable criminal laws (drug laws) that incidentally affect the exercise of a liberty (free exercise of religion) protected under the First Amendment. *Employment Division, Oregon Department of Human Resources v. Smith*, 58 U.S.L.W. 4433 (U.S. April 17, 1990). As the Court noted, its "decisions have consistently held that the right of free exercise does not relieve an individual of the obligation to comply with a

[11] In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court rejected a group of protesters' position that a governmental camping ban violated the First Amendment because it interfered with the expression that the protesters contended was present in their overnight residence in a symbolic tent city. The Supreme Court observed: "That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban [on overnight camping] any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).' " *Smith*, 58 U.S.L.W. at 4435 (quoting *United States v. Lee*, 455 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring in judgment)). I am at a loss to be able to comprehend how the First Amendment provides a dancer's alleged exercise of a First Amendment right any greater freedom from generally applicable criminal laws than is enjoyed by an individual attempting to practice a First Amendment right to free exercise of religion. " ' "It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." ' " *Osborne v. Ohio*, 58 U.S.L.W. 4467, 4469 (U.S. April 17, 1990) (quoting *New York v. Ferber*, 458 U.S. 747, 761-62 (1982) that quoted, in turn, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)). Although Indiana's public nudity regulation may have "an incidental effect" upon persons who attempt to incorporate nudity into expressive conduct, an effect not felt by others who fail to incorporate nudity into their expression, this "incidental effect" is clearly justified by Indiana's proper and admirable concern for the promotion of public morality in contrast to the State of Wisconsin.[12] This is a legitimate interest unrelated to the suppression of speech.

---

[12] As Judge Posner stated in *Kucharek v. Hanaway*, No. 89-2885, slip op. at 11 (7th Cir. May 7, 1990):

> "No doubt it rather depreciates Wisconsin's commitment to extirpating obscenity to create an exemption of this sort; for imagine the hue and cry if Wisconsin exempted officials and employees of schools and public libraries from criminal liability for prostitution or rape. But this is a state that got along for eight years with no obscenity statute at all: the American Denmark. There are degrees of perceived criminal gravity, and apparently in Wisconsin obscenity is of not much more than zero degree. But Wisconsin can make its own judgment about the seriousness of obscenity as a social problem responsive to criminal punishment without encountering problems under the equal protection clause, and it ill becomes pornographers to complain about the leniency of an obscenity statute."

If the majority's view of the legal theory of content neutrality was controlling law a state could never regulate the time, place or manner of speech to further an interest unrelated to the suppression of speech because any attempt to enforce such a restriction would constitute the suppression of a "particular message contrary to the legislature's prescribed vision." This becomes especially clear when the majority's interpretation of content neutrality is applied to the facts of two recent cases in which the Supreme Court upheld governmental time, place or manner regulations. When the majority's interpretation of content neutrality is applied to the facts in *Ward v. Rock Against Racism*, 109 S. Ct. 2746 (1989), a case where the Court held that the government's interest in a quiet park justified governmental restrictions on the volume of music performed in the park, the government's interest would be considered directly related to the suppression of speech because the musicians' loud music would express a message reflecting their opposition to this governmental interest. Similarly, when the majority's view of content neutrality is applied to *Frisby v. Schultz*, 487 U.S. 474 (1988), a case where the Court held that the government's interest in residential privacy justified a ban of targeted residential picketing, the government's interest would again be considered directly related to the suppression of speech because the picketers' expressive activity in the residential neighborhood expresses a message reflecting their opposition to this governmental interest. The Supreme Court's validation of the restrictions in both cases underscores the fallacious nature of the majority's interpretation of the concept of content neutrality.

Indiana's public nudity statute also "leave[s] open ample alternative channels of communication." *Ward*, 109 S. Ct. at 2753. The plaintiffs must only remain attired in the barest minimum of clothing during their dances, a requirement that hardly impedes the communication of the themes "of eroticism and sensuality"[13] that the majority believes

---

[13] Majority Opinion at 11.

are found in the plaintiffs' conduct. Complete nudity is not indispensable to the plaintiffs' supposed message of "eroticism and sensuality," because there are myriad ways in which plaintiffs could communicate their erotic and sensual theme while clad in the minimal attire the State of Indiana requires under its public nudity statute. Indeed, strippers wearing proper coverings have long conveyed the alleged message of "eroticism and sensuality," that the majority has divined in the plaintiffs' conduct. Thus, "ample alternative channels" remain for the communication of any message the plaintiffs arguably wish to convey, although I would again point out that the plaintiffs have clearly stated that they have no intention of conveying or expressing any political or ideological message.

It remains necessary to determine whether Indiana's application of its public nudity statute to the plaintiffs' conduct is "narrowly tailored to serve a significant governmental interest." *Community for Creative Non-Violence*, 468 U.S. at 293. In *Frisby v. Schultz*, 487 U.S. 474, 485-86 (1988), the Supreme Court made clear that this constitutional requirement does not turn upon whether a statute "bans" or merely "regulates" particular expressive activity:

> "A statute is narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 808-810, 104 S. Ct. 2118, 2130-2132, 80 L. Ed. 2d 772 (1984). A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil. For example, in *Taxpayers for Vincent* we upheld an ordinance that banned all signs on public property because the interest supporting the regulation, an esthetic interest in avoiding visual clutter and blight, rendered each sign an evil. Complete prohibition was necessary because 'the substantive evil—visual blight—[was] not merely a possible byproduct of the activity, but [was] created by the

> medium of expression itself.' *Id.* at 810, 104 S. Ct. at 2131."

Whether Indiana's public nudity statute is viewed as an "attempt to ban nude dancing," Majority Opinion at 14, or a mere attempt to regulate the nudity found in this alleged particular expressive activity,[14] the controlling question remains whether "each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, 487 U.S. at 485. In *Frisby* the Supreme Court concluded that

> "the 'evil' of targeted residential picketing, 'the very presence of an unwelcome visitor at the home,' *Carey* [*v. Brown*, 447 U.S. 455, 478 (1980)] (REHNQUIST, J., dissenting), is 'created by the medium of expression itself.' See *Taxpayers for Vincent*, 466 U.S. at 810, 104 S. Ct. at 2131. Accordingly, the Brookfield ordinance's complete ban of that particular medium of expression is narrowly tailored."

Frisby, 487 U.S. at 487-88. Similarly, in our case the relevant substantive evil, the damage to public morality resulting from the violation of Indiana's well drafted statute barring public nudity, is not "merely a possible byproduct" of the plaintiff's nude dancing, but is "created by the medium of expression [nude dancing] itself." *See Taxpayers for Vincent*, 466 U.S. at 810. Thus, in applying its public nudity statute to proscribe the plaintiffs' public nudity the State has "target[ed] and eliminate[d] no more than the exact source of the 'evil' it [sought] to remedy," *Frisby*, 487 U.S. at 485, and has thus regulated in a manner "narrowly tailored to serve a significant governmental interest." *Community for Creative Non-Violence*, 468 U.S. at 293.

The application of the Indiana public nudity statute to the plaintiffs' nude dancing activities, as well as to nu-

---

[14] *See generally* Posner concurrence at 41.

merous other nude activities, is nothing more than a permissible regulation of the manner of any expression that is arguably contained in this conduct. Expression is hardly impeded where the plaintiffs have stated emphatically that they were not conveying a "larger political or ideological statement" and were merely attempting to entice customers to purchase drinks. "[N]ude dancing is not a fundamental right entitled to heightened scrutiny. . . ." *Wal-Juice Bar*, Westlaw Printout at 12. Under no stretch of the imagination can the United States Constitution be considered to require an exemption to be carved from this statute to permit dancers in bars to flout the same prohibitions on public nudity that bind all others within the State of Indiana. I dissent and join Judge Manion's dissent as well as Sections I and III of Judge Easterbrook's dissent.

EASTERBROOK, *Circuit Judge*, with whom MANION and KANNE, *Circuit Judges*, join, and with whom COFFEY, *Circuit Judge*, joins with respect to Parts I and III, dissenting. Our court brands as unconstitutional a state law forbidding anyone to "[a]ppear[ ] in a state of nudity" in a "public place". Ind. Code §35-45-4-1(a)(3). The Supreme Court has sustained the application of this statute to bars. *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), appeal dismissed for want of a substantial federal question, 446 U.S. 931 (1980). The last time the case was here, we observed that *Baysinger* did not present a contention that barroom dancing is protected "expression", and we remanded so that the district judge could determine whether the dancers express something. 802 F.2d 287 (7th Cir. 1986). He found that they do not. 695 F. Supp. 414 (N.D. Ind. 1988). Today the court holds that expression is unnecessary, that *all* dance as entertainment is protected unless obscene.

I

Indiana does not regulate dancing. It regulates public nudity. The difference is dispositive for constitutional purposes even if one accepts the majority's conclusion that dancing is speech (the subject of Part II below). Nudity is conduct. Laws regulating conduct may apply to expression without violating the First Amendment. Almost the entire domain of Indiana's statute is unrelated to expression, unless we view nude beaches and topless hot dog vendors as speech. Unclothed dancing is a tiny fraction of the ambit of the rule, and what plaintiffs need is an exemption from a well-justified norm.

Conduct that plays a role in expression is not exempt from neutral regulation. Persons sought to sleep in the park, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (*CCNV*), to convey a message about homelessness. Nonetheless, the Court held, the Park Service may apply its regulation forbidding camping. Regulation of conduct is acceptable if it furthers an important interest that is "unrelated to the suppression of free expression". *United States v. O'Brien*, 391 U.S. 367, 377 (1968). See also, e.g., *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768, 778-79 (1990); *United States v. Albertini*, 472 U.S. 675 (1985). Burning a draft card in *O'Brien*, sleeping in *CCNV*, entering a military reservation in *Albertini*, boycotting criminal defense work in *Superior Court Trial Lawyers*, all were done to send a political message; although politics are the heart of the First Amendment, all of these messages were held subject to viewpoint-neutral regulation of the conduct. Cf. *University of Pennsylvania v. EEOC*, 110 S. Ct. 577, 587-88 (1990) (EEOC may have access to university's tenure files under rules of general application notwithstanding possible burden on speech).

Indiana's reasons for prohibiting public nudity are "unrelated to the suppression of free expression". Its interest in attire is at least as great as the Park Service's interest in regulating catnaps, the subject of *CCNV*. Indiana need not prove that its interest in clothing is vital to welfare,

or disprove the plaintiffs' assertion that an exemption for barroom dancing would be harmless: "The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important governmental interests." *Albertini*, 472 U.S. at 688. The state's burden is especially light because the plaintiffs do not seek to transmit *any* message.

If Indiana forbade nudity *only* when employed in dance, then it would have a tough row to hoe. A dance-only law would be a regulation *of expression* if, as my colleagues believe, dance is speech. Regulation of expression faces high hurdles. The concurring opinion has things backwards in suggesting, slip op. 42, that a local law drawing a bead on nude dancing is easier to sustain than a state-wide ban on public nudity. If Indiana had targeted dancing, as the majority supposes, slip op. 14 n.7, I would be more sympathetic to its conclusion—although even then the state might have the power. States may prevent corporations from supporting candidates for public office, *Austin v. Michigan Chamber of Commerce*, 110 S. Ct. 1391 (1990). Can it be that nude dancing at the corporation's tavern has *greater* constitutional protection than the firm's political speech?

But Indiana didn't try to clamp down on dancing because of what it expresses. Erotic dance occurs at plaintiffs' establishments daily, without hindrance from Indiana. The state bans public nudity and no more. Streakers, flashers, mooners, nymphs who want all-over tans, and models wearing see-through blouses at trade shows to attract attention to machine tools are subject to the same rules. The law has nothing to do with the expression or viewpoint of the undressed person. On the supposition that nude dancing is "speech", this is dispositive. Under *CCNV*, *Superior Court Trial Lawyers*, and like cases, the state need not justify failure to *exclude* nude dancing from its general law directed to public nudity.

The concurring opinion maintains, slip op. 45, that Indiana's law is not neutral because the Supreme Court of Indiana held in *Baysinger* that the statute does not apply to speech. This approach would do away with the entire line of cases following *O'Brien*. A decision saying that a statute does not apply to protected expression recognizes the supremacy of the Constitution over state law; to acknowledge a limit the Constitution imposes on legislation is not to abandon the generality of the law. The rules concerning use of the parks at issue in *CCNV* had exceptions too; the Park Service did its best to accommodate expression, allowing the erection of symbolic tent cities, but drew the line at sleeping (which triggered the regulation forbidding "camping"). Government does not forfeit its entitlement to enforce laws regulating conduct by attempting to facilitate the expression of ideas.

Cases often say that regulation of conduct will be sustained when the governmental interest is sufficiently "important". Members of the majority say that Indiana's interest in clothing is tissue-thin. No case in the Supreme Court turns on a conclusion that the government's interest is inadequate. Whether judges should conduct such an inquiry at all when a neutral statute affects "expression" rather than "speech" is a question yet to be resolved. Judge Scalia's opinion in *CCNV*, which the Court cited approvingly in *Texas v. Johnson*, 109 S. Ct. 2533, 2540 (1989), answers this question "no", and his assessment is persuasive.

> I start from the premise that when the Constitution said "speech" it meant speech and not all forms of expression. Otherwise, it would have been unnecessary to address "freedom of the press" separately—or, for that matter, "freedom of assembly," which was obviously directed at facilitating expression. The effect of the speech and press guarantees is to provide special protection against all laws that impinge upon spoken or written communication (which I will, for the sake of simplicity, refer to generically as "speech") even if they do so for purposes that have nothing

to do with communication, such as the suppression of noise or the elimination of litter. But to extend *equivalent* protection against laws that affect actions which happen to be conducted for the purpose of "making a point" is to stretch the Constitution not only beyond its meaning but beyond reason, and beyond the capacity of any legal system to accommodate.

The cases find within the First Amendment some protection for "expressive conduct" apart from spoken and written thought. The nature and effect of that protection, however, is quite different from the guarantee of freedom of speech narrowly speaking. It involves a significantly different balancing of private rights and public interests, and does not always call for the detailed "First Amendment analysis" characteristic of the speech cases . . . . Specifically, what might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires. But a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause. In other words, the only "First Amendment analysis" applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of the law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is a substantial justification for the proscription, just as it does in free-speech cases.

Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity

(sound amplification, campaign contributions, littering). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

Community for Creative Non-Violence v. Watt, 703 F.2d 586, 622-23 (D.C. Cir. 1983) (en banc) (Scalia, J., dissenting) (emphasis in original, footnotes omitted), reversed, 468 U.S. 288 (1984).

Although the Court has not considered Judge Scalia's proposal for speech cases, it has adopted these views with respect to another part of the First Amendment, the Free Exercise Clause. *Employment Division v. Smith*, 58 U.S.L.W. 4433 (U.S. Apr. 17, 1990), holds that courts may not "balance" the public interest in the application of a statute neutral with respect to belief against the private party's interest in engaging in the forbidden activities. It wrote that the "government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, 'cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.' " *Id.* at 4437, quoting from *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988). Because the statute at hand forbade use of peyote without regard to smoker's motive, the Court held that there was no need even to consider how important the practice was to religion. Neutrality may not be a necessary condition of constitutionality, but it is a sufficient one.

So here. If we ask whether "the purpose of [Indiana's anti-nudity] law is to suppress communication", we must answer no. Ind. Code §35-45-4-1(a)(3) has nothing to do with speech, with expression, or with dancing—ballet, ballroom, or barroom varieties. It is indifferent to whether there is a message, or to the viewpoint expressed by any

message. It prohibits public nudity, leaving speakers ample methods to convey thoughts of all kinds. Laws preventing prostitution (sex for money) apply even if someone wants to film the act and use it in protected expression, as laws against bank robbery and murder mean that producers of *Bonnie and Clyde* had to fake robberies and deaths rather than shoot real ones. See *American Booksellers Ass'n v. Hudnut*, 771 F.2d 323, 330, 332 (7th Cir. 1985), affirmed, 475 U.S. 1001 (1986). In the same fashion, laws against public nudity apply even if someone wishes to use nudity as an input into an expressive performance.

The concurring opinion observes, slip op. 44-45, that Indiana did not rely on *O'Brien*, *CCNV*, *Albertini*, and similar cases. Usually that means waiver. The state loses its battle with Darlene Miller but retains the right to make its best arguments against other hoofers tomorrow. Yet neither the majority nor the concurrence grants the state this quarter. Both reject on the merits any possibility that Ind. Code §35-45-4-1(a)(3) is a neutral regulation of conduct. If we are to decide the *O'Brien* question rather than deem it waived, we should recognize that this line of cases vindicates Indiana's statute.

II

The majority writes for the most part as if Indiana had a law that zeroed in on the salacious aspects of nude dancing. Even such a statute, however, would be within its constitutional powers, for dancing is not "speech".

A

The court concludes that "non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment", slip op. 8. This dispenses with expression as an ingredient of speech, for the district judge found that there is no expression in these dances. With respect to plaintiff Miller, who dances at JR's Kitty Kat Lounge, the judge concluded:

> When she dances, Ms. Miller perceives herself as "just entertaining, just dancing". The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later.

Judge Sharp also adopted Judge Miller's findings concerning a similar act in the neighboring Ace-Hi Lounge:

> Ms. Jacobs dances for fifteen to twenty minutes as a juke box plays four songs. She buys outfits to wear when she dances, but her act consists of removing the outfits. Her act features no choreography; she simply takes the stage and dances. Ms. Jacobs believes she entertains the patrons in the establishment: they come in to see her, they applaud, they buy her drinks in appreciation of her performance. Her pay depends upon the number of drinks purchased, and she must sell a certain number of drinks to be paid.

Although characterization in First Amendment cases is open to reexamination on appeal, *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (plurality opinion); *American Jewish Congress v. Chicago*, 827 F.2d 120, 129-30 (7th Cir. 1987) (dissenting opinion), findings of historical fact must be respected. Especially when the parties agree that they are correct. Miller's lawyer conceded at oral argument that she was not trying to express anything. Counsel stated:

> [T]here is not a larger political or ideological statement being made. I do not contend for a second that that is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in *Schad*, that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said.

The court does not re-characterize the facts so much as say they are immaterial because dance is "inherently expressive" (slip op. 8). To the extent this means that professional choreography and staging are not essential, I agree.

To the extent we ask what something is "inherently", rather than whether real people are trying to communicate, I part company with the court because it effectively holds that all purposive conduct is speech. "Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. . . . [W]e decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it." *CCNV*, 468 U.S. at 293 n.5.

B

The First Amendment protects "the freedom of speech". Go-go dancing is not "speech". James Madison would have guffawed had anyone suggested public nudity as an example of "freedom of speech"—or of anything that could be derived from the Framers' conception by a series of plausible interpretations. Parading in a state of undress is conduct, not speech. Even Justices Black and Douglas, who thought the First Amendment absolute, rendering all efforts to curtail obscene speech unconstitutional, drew the line here. Dissenting in *Roth v. United States*, 354 U.S. 476, 512 (1957), Justice Douglas (joined by Justice Black) remarked: "I assume there is nothing in the Constitution which forbids Congress from using its power . . . to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." (Emphasis in original.) What these absolutists gave as a *reductio ad absurdum*, the court today holds the First Amendment commands.

"Speech" is of course one form of conduct, the creation and dissemination of oral and written symbols. Other forms of conduct also convey ideas. So there is no bright line between conduct and speech, and laws regulating conduct

may impede communication. What to do? The standard response is that "conduct" is treated as "speech" when it conveys a message, and regulation of this conduct fails when its application depends on that message. E.g., *Johnson*; *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). These are separate inquiries: first the conduct must be designed to express something, and second the law's effect must turn on the viewpoint expressed. Applying a law banning nudity to striptease dancing does not create problems on either branch. Part I showed that Indiana's rule does not depend on viewpoint. Much closer is the question whether the plaintiffs' dances express something, to which I turn.

C

Communication is a subset of the universe of human behavior. "The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth*, 354 U.S. at 484. "Speech" cannot be synonymous with purposive conduct, else the First Amendment means that "Congress shall make no law . . . abridging the freedom of conduct"—or, for short, "Congress shall make no law".

My colleagues take a wrong turn in discussing works of art, pictures in books, and other forms of communication. These are not "conduct". Although the Framers drafted a rule to govern political speech, see Leonard W. Levy, *Emergence of a Free Press* (1985); Alexander Meikeljohn, *Free Speech and its Relation to Self Government* (1948), for a long time (and for good reasons) judges have equated political and frivolous books, paintings, music, and other works of the mind that have been committed to parchment (or canvas, or celluloid, or vinyl, or today pitted aluminum on plastic). Rock music, *Penthouse* magazine, and "slasher" movies are speech; we needn't ask whether they are conduct *plus* expression. One need not divine the message of a painting to separate the conduct from the

speech; there is no "conduct" in it. In order to protect genuine speech from the censor, the definition of "obscenity" allows little room for regulation. Conduct may be regulated although not obscene. Our problem involves conduct, and to know whether to treat conduct *as* speech we must ask whether it shares the communicative aspect that led to the protection of *real* speech.

"In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.' " *Johnson*, 109 S. Ct. at 2539, quoting from *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). The district court found that the dancers are not trying to express an idea; the dancers agree. Our court does not say otherwise; it holds instead that a message is not necessary to expression because "eroticism and sensuality" (slip op. 11) automatically qualify as speech. Can other emotions be far behind? Despite the court's claim that its holding covers only "dance as entertainment", the majority does not identify any kind of entertainment that contains neither ideas nor emotions. Its rationale applies to entertainment en bloc.

Pervading this opinion is a belief that states may draw no lines where art is concerned. Sophisticates go to the museum and see Renoir's *Olympia* or to the opera and see a soprano strip during the Dance of the Seven Veils in Strauss' *Salome*. If the First Amendment protects these expressions, the argument goes, Joe Sixpack is entitled to see naked women gyrate in the pub. Slip op. 11, quoting from *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974). Why does this follow? That a dance in *Salome* expresses something does not imply that a dance in JR's Kitty Kat Lounge expresses something, any more than the fact that Tolstoy's *Anna Karenina* was a stinging attack on the Russian social order implies that the scratching of an illiterate is likely to undermine the Tsar. Rembrandt applied paint to canvas; a bucket of paint

hurled at a canvas also deposits paint. A conclusion that Rembrandt's paintings are speech would not imply that all paint is expressive. Juvenile delinquents who deface subway cars with spray paint may be "expressing themselves" in a colloquial sense, but they are not communicating ideas beyond their disdain for the sensibilities of others. The First Amendment does not let a government draw lines based on the viewpoint the performer expresses; it does inquire whether particular "entertainment" is "expression" in the first place. The Constitution does not protect "the freedom of entertainment". "Speech"—by implication "expression" of thoughts through conduct—is the foundation for its application.

Music is communicative or descriptive, and "*as a form of expression and communication*, is protected under the First Amendment." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (emphasis added). Bach's *Mass in B Minor*, Beethoven's *Pastoral (Sixth) Symphony*, Wagner's *Parsifal*, Mahler's *Resurrection (Second) Symphony*, the Beatles' *Sergeant Pepper's Lonely Hearts Club Band*, like other vocal, religious, and program music, tell stories—sometimes sexually explicit ones, as in Orff's *Carmina Burana*, which, if it were not sung in Latin, could not be put on the airwaves. *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978). People may fairly dispute whether absolute music, such as LaMonte Young's *Well-Tuned Piano*, communicates thoughts, but surely it embodies them (the right place for the major third, etc.); all that we call music is the product of rational human thought and appeals at least in part to the same faculties in others. It has the "capacity to appeal to the intellect", *Ward*, 109 S. Ct. at 2753, is not "conduct", and is closer to speech (even an emotional harangue is speech) than to smashing a Ming vase or kicking a cat, two other ways to express emotion.

Like mimes, ballets tell stories, often erotic stories, and clothing (or lack of it) may help the tale unfold. No one can miss the sensual message in Stravinsky's *Le Sacre du Printemps* or the fairy tale in Tchaikovsky's *Nutcracker*. Ballet rarely approaches absolute music in ab-

straction. Even Balanchine's choreography to Stravinsky's *Agon*, a model of spare movement, does not suppress the contest to which the title refers. People objected to Nijinsky and Isadora Duncan because of the message rather than the medium.

One could try reductionism, but it would fail. All music is rhythmic pressure on the eardrum. Mozart's string quartets, jackhammers, and humpback whales all produce rhythmic compressions. Yet Mozart's music is profound, jackhammers are the sound of progress but express nothing beyond what they do, and whale song, for all its haunting beauty, has only the message the listener supplies. Laws muffling jackhammers, or allowing the hunting of whales, do not violate the First Amendment.

To say that the line between barroom dancing and ballet is indistinct is not to say that no state may recognize the difference: "[W]e would poorly serve both the interests for which the State may validly seek vindication and the interests protected by the First and Fourteenth Amendments were we to insist that the sort of bacchanalian revelries [nude barroom dancing!] that the Department sought to prevent by these liquor regulations were the constitutional equivalent of a performance by a scantily clad ballet troupe in a theater." *California v. LaRue*, 409 U.S. 109, 118 (1973). The line separating photos that are obscene from those the Constitution protects depends in part on whether the work, "taken as a whole, lacks serious literary, artistic, political or scientific value", *Miller v. California*, 413 U.S. 15, 24 (1973). So the Court believes that the Constitution allows states to distinguish serious art from swill. Nude barroom dancing lacks "serious literary, artistic, political or scientific value". If it were *real* speech it would not be obscene (it is too mild to satisfy the rest of the *Miller* test), but the lack of "serious . . . artistic . . . value" assures us that Indiana is not squelching important aspects of culture.

Why is it important that the plaintiffs dance? The court uses a definition of dancing ("moving the body in a rhythmical way, usually to music", slip op. 9) broad enough to

cover most physical activity. Swimmers, roller skaters, ice skaters, walkers, skateboarders, matadors, and construction workers using jackhammers move rhythmically, often to music. The majority believes that "the communication of emotion *or* ideas" (*ibid.*, emphasis added) is protected by the First Amendment. Many things other than dance, or entertainment, or dance-as-entertainment, express "emotion". Quarterbacks who throw touchdown passes exude emotion. Consistent application of the majority's approach prevents it from limiting constitutional protection to "dance as entertainment".

What of flashers, whose "message" scarcely differs from nude dancers'? Imagine an organized flasher, shucking his coat in a booth next to the hot dog vendor and adding a boom box and hip motions. This is "dance" as my colleagues use that word. If dance is "inherently" expressive then the flasher's act is speech; it can't matter that the display takes place outdoors, or that the customers gawk for free. Flashers affront an unwilling audience, yet speech is protected even when listeners are revolted, *Cohen v. California*, 403 U.S. 15, 21 (1971). Courts holding that nude dance is protected speech when the dancers are indoors, and the customers pay to watch, but not otherwise, e.g., *International Food & Beverage Systems v. Ft. Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (which the majority quotes approvingly at slip op. 12), offer no principle by which "expression" turns on the existence of walls, or the solvency or approval of the audience. See *Erznoznik v. Jacksonville*, 422 U.S. 405 (1975) (drive-in movie is protected speech despite fact that unwilling people see, and drivers may be distracted by, the images).

Barroom displays are to ballet as white noise is to music. We know that sexual congress is not protected by the First Amendment, whether offered to the public as entertainment, *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973), or sold in a spot market, *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986). Sex may be entertaining and is at least as expressive as nude go-go dancing. Because the patrons do not fondle the dancers, our

case is not *Arcara*, but this distinction is unrelated to expression. (Indeed, on the majority's view "lap dancing", a form of fondling, also might be protected speech, because it too expresses the joy of sex and involves "moving the body in a rhythmical way, usually to music".)

If the First Amendment covers entertainment, how ought we treat bullfighting, unlawful throughout this nation but popular in many others? The matador "entertains" no less than the stripper and "expresses" more. Bullfighting is a form of dance, with elaborate choreography and messages clearly perceived by the spectators. Indiana does not offer even a "time, place, and manner" for the sport. If it were to add baseball or checkers to the list of forbidden pleasures, or if Congress were to black out telecasts of football games when the stadiums do not sell out (it has), objections could not be based on the First Amendment.

No one can escape the bullfighting problem by saying that it involves cruelty to animals, which state laws forbid. E.g., Ind. Code §35-46-3-12(1). That is not the only reason we forbid such spectacles. "Bearbaiting and cockfighting are prohibited only in part out of compassion for the suffering animals; the main reason they were abolished was because it was felt that they debased and brutalized the citizenry who flocked to witness such spectacles." Irving Kristol, *On the Democratic Idea in America* 33 (1972). One may say the same for striptease dancing. Anyway, the question is whether the matador is speaking—whether the First Amendment *applies*—not whether the state's claim to regulate surmounts that hurdle. Despite its refrain that the opinion is limited to dance as entertainment, the court's approach means that bullfighting is speech. If so, it is hard to see on what ground a state may forbid bullfighting. Speech is protected even when it produces risks to people, as in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), and *Hudnut*, 771 F.2d at 328-30. I cannot accept a rationale implying that a state may muffle speech to promote the welfare of bulls but not to promote the welfare of blacks (*Brandenburg*) or women (*Hudnut*).

D

We are told that however wide the gulf between striptease dancing and the *Federalist Papers*, the Rubicon was crossed in *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981). It wasn't. *Schad* dealt with a zoning ordinance that forbade all live entertainment. This barred the town gates to Dylan Thomas's *Under Milkwood* as well as to plays and other forms of speech. The Court held it overbroad. By dismissing the appeal in *Baysinger*, the Court has already held that Indiana's public nudity statute is not overbroad.

Although the laws have nothing in common, *Schad* contains language that has been taken to resolve the question before us.

> By excluding live entertainment throughout the Borough, the Mount Ephraim ordinance prohibits a wide range of expression that has long been held to be within the protections of the First and Fourteenth Amendments. Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee. Nor may an entertainment program be prohibited solely because it displays the nude human figure. "[N]udity alone" does not place otherwise protected material outside the mantle of the First Amendment. Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulation.

Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the Borough: no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment. Because appellants' claims are rooted in the First Amendment, they are entitled to rely on the impact of the ordinance on the expressive activities of others as well as their own.

452 U.S. at 65-66 (citations and footnote omitted). Culling this passage and adding ellipsis can produce phrases such as "nude dancing . . . [is] rooted in the First Amendment", but this is not the Court's point. It tells us that a "wide range *of expression*" is protected, and that " '[n]udity alone' does not place *otherwise protected* material outside the mantle of the First Amendment". Conduct gets to *be* "otherwise protected", however, by having an element of "expression". So nudity at the end of *Hair* does not withdraw the protection for the political expression that dominates that play, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975). Nudity in a ballet expressing ideas would not remove it from the realm of speech. These principles do not aid the plaintiffs today, however, for they have not established that they are engaged in "expression".

Cases such as *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), are no more helpful: "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected expression, . . . this form of entertainment *might* be entitled to First and Fourteenth Amendment protection *under some circumstances*." (Citation omitted, emphasis added.) Under *what* circumstances? When it communicates something, I should think. *FW/PBS, Inc. v. Dallas*, 110 S. Ct. 596 (1990), is even less aid to the plaintiffs, for there the city conceded that nude dancing is speech, and "[i]t is [the] Court's practice to decline to review those issues neither pressed nor passed upon" in the court of appeals. *Id.* at 604.

To the extent *Schad* and *Doran* offer guidance, the Court's resort to overbreadth analysis implies that nude dancing is not always clothed with expression. Overbreadth is a special doctrine entitling someone whose words or deeds could be regulated or even proscribed to prevail on the ground that as applied to someone else the law prohibits protected speech. Schad offered live nude dancing to his patrons. If nude dancing is expression, or if all entertainment is protected speech, it would have been

simple to say: "Schad offers entertainment, which the borough forbids; therefore the law is unconstitutional." Instead the Court said that "*[w]hatever* First Amendment protection should be extended to nude dancing", Schad's "claims" (not the nudity) were sufficiently rooted in the First Amendment that he could contest the application of the ordinance to "the expressive activities of others". Only three weeks later, Justice Stevens remarked that although the Court has "written several opinions implying that nude or partially nude dancing is a form of expressive activity protected by the First Amendment, the Court has never directly confronted the question". *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-19 (1981) (dissenting opinion). Justice White, the author of *Schad*, concluded four years ago that the status of nude dancing remains unsettled. *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (dissenting from the denial of certiorari). Nothing since then changes that assessment.

Dallas v. Stanglin, 109 S. Ct. 1591, 1595 (1989), comes closest to our problem. It holds that social dancing is *not* "expressive activity . . . protected by the First Amendment." How is nude barroom dancing different from social ballroom dancing? The court does not say; it does not mention *Stanglin*. The concurring opinion suggests (slip op. 22) that the difference lies in performance: social dancing is like "casual chit-chat", not the kind of "statement" that the First Amendment protects. The majority does not embrace this, for good reason. The sole case on which the concurring opinion relies arises out of public employment. Employees who go to work for the government surrender rights to speak to the extent necessary to allow the government to function. E.g., *CSC v. Letter Carriers*, 413 U.S. 548 (1973); *Snepp v. United States*, 444 U.S. 507 (1980). Even in the public employee cases an audience is not essential to constitutional protection. *Rankin v. McPherson*, 483 U.S. 378 (1987). See also, e.g., *Norwell v. Cincinnati*, 414 U.S. 14 (1973) (insulting language to a police officer's face). Congress could not imprison anyone on account of words of endearment whispered in the ear

of a loved one. If privacy of speech does not blot out the First Amendment, then the difference between the brazen display of barroom dancing and the subdued display of ballroom dancing cannot reconcile this case with *Stanglin*. Perhaps, then, the concurring view depends on the principle that "low value" speech of all kinds is unprotected. Yet what keeps nude barroom dancing out of that category?

A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little vitrue other than avoiding inconvenient precedent such as *Stanglin*. If the "expression" in barroom dancing lies, as my colleagues believe, slip op. 11-12, in a celebration of sex, conveying the pleasure dancers take in sensuality, social dancing is the more expressive. Barroom dancers feign emotion; ballroom dancers express the real thing. So if precedent is what drives our court today, the most powerful case is *Stanglin*, which undermines the majority's conclusion.

E

Speech versus conduct is not only the First Amendment's line but also a distinction essential to democratic governance. People act for reasons. Acts therefore imply the virtue or import of these reasons. And if some people, such as the dancers in JR's Kitty Kat Lounge, believe that their autonomic nervous systems are in charge, so that they have no message, Sigmund Freud will correct them. Even in a quantum-mechanical universe there are reasons, and clever observers can infer messages having nothing to do with the id and the superego. A driver doing 90 in a school zone makes an implicit proposal to change the speeding laws, or comments on the dominance of man over machine, or declaims the low value of children's lives, or advertises the capabilities of the car. So too we attribute to nude dancing a belief in the value of Eros, or a retelling of the Genesis story, or a burst of lustful emotion. If that strains credulity we may consult the books. Persons wanted to sleep in the national parks in *CCNV* to show that the high price of housing bred homelessness; strippers protest the high cost of clothing.

This is clever invention, too clever for constitutional adjudication. Neither the dancers nor their lawyers came up with a message in five years of litigation. That well-read judges can tease out of dancers' acts thoughts the dancers never had, and divine in a rule requiring opaque covering of the nipples a threat to the display of Aubrey Beardsley's prints, shows the importance of drawing lines rather than the need to obliterate them. "It is possible to find some kernel of expression in almost every activity a person undertakes . . . but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *Stanglin*, 109 S. Ct. at 1595.

Transmogrifying conduct into speech thrusts courts into the business of substantive due process. For if entertainment is speech, then it is subject only to "reasonable time, place, and manner restrictions". "Reasonable" is the key word. Legislatures bear the burden of showing that the regulation is reasonable. What is "reasonable", except what is wise? Assessing the wisdom of legislation is the program of *Lochner*. It failed when applied to wages and hours laws and is no more suited to nude dancing. "Reasonableness" is not a standard, not law at all. John Hart Ely, *Democracy and Distrust* 111-16 (1980); T. Alexander Aleinikoff, *Constitutional Law in an Age of Balancing*, 96 Yale L.J. 943, 966-68, 976-79, 984-95 (1987). When courts assess the "reasonableness" of legislation, they and not the elected legislators are the real policy-makers.

Preserving the spheres of judicial and political decision is not "abdication of [judicial] responsibility", slip op. 8 n.4. You can't "abdicate" a power you do not possess. When deciding whether judicial power *exists* a court must recognize the importance of preserving distinctive political and judicial roles. If nude dancing is "speech" it is so by the barest margin; someone standing at the center of the First Amendment (political speech) would need binoculars to see this far into the periphery. Judges should not establish rules that "disserve[ ] principles of democratic self-governance", *Garcia v. San Antonio Metropolitan Transit*

Authority, 469 U.S. 528, 547 (1985). "Values that are protected against governmental interference through enshrinement in the Bill of Rights are not thereby banished from the political process", *Employment Division v. Smith*, 58 U.S.L.W. at 4438, and judges must respect the boundary between that process and the domain of law. Concern about the limits of *judicial* power, about the authority for an official with life tenure to countermand a decision of the elected legislature, must be at the forefront in every constitutional case. Article III does not commit to federal courts the resolution of all questions about the wisdom of rules. *Allen v. Wright*, 468 U.S. 737, 750-53 (1984); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 865-66 (1984); *Vance v. Bradley*, 440 U.S. 93, 110-11 (1979); *TVA v. Hill*, 437 U.S. 153, 195 (1978). Yet it is exactly that power we claim in first treating conduct as "speech" and then saying that only "reasonable" regulation is allowed. The First Amendment is designed to get government out of the business of regulating speech while preserving to legislators freedom to act with respect to other human affairs. The court's two-step, by contrast, treats conduct as speech yet asserts a broad power to regulate speech ("reasonably", of course) and means that fundamental decisions about legislation of all kinds vest in the judiciary.

Judges avoid this by insisting on categorical rules. "Conduct" and "speech" are the principal categories, and observing that distinction is essential if we wish to maintain the boundary between legislative and judicial roles in a democratic society. Any sentient being knows that categories are imperfect. Lawyers are trained to disparage line-drawing by showing that no matter where the line goes you can frame essentially indistinguishable cases on either side. Such a line is nonsensical!, comes the *coupe de grace*. The exercise is child's play in the domain of art and entertainment, for "what is art?" is a question unanswered for centuries. Albrecht Drer and a vandal wielding a can of spray paint have *some* things (paint, surfaces, emotions) in common. Yet the extremes are distinctive,

and the difference permits a line even though other cases are much closer. Cf. *United States v. Powell*, 423 U.S. 87, 93 (1975).

Political society depends on stable lines to govern a world of continuums. Anything else transfers the locus of power. Judges who see the many facets of a subject, who know that just as a line cannot bisect a sphere so no one-dimensional rule can partition a multi-dimensional world, also must understand the role lines play in governance and the allocation of functions. Complex reality mocks rules, yet we must deny ourselves the comfort of requiring the law to match the universe. Holmes understood this. *Klein v. Board of Tax Supervisors*, 282 U.S. 19, 23 (1930); *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908). An era of balancing has obscured this message, but it is no less important today. See *Employment Division v. Smith*, 58 U.S.L.W. at 4438 n.5: it is "horrible to contemplate that federal judges will regularly balance against the importance of general laws the significance of religious practice"—or, I should think, the significance of nudity to a dance.

III

If go-go dancing were "expression", and *if* dancers regularly undressed during the bacchanal in the third act of Saint-Saëns' *Samson et Dalila* without objection from Indiana, we would have an interesting case. So far as this record reveals, however, there is neither expression nor unequal enforcement according to viewpoint. An officer told the judge that he had never arrested a ballet dancer for nudity, but nothing in the record suggests that ballet dancers pirouette without tutus in his jurisdiction.

Statutes may express moral views about how the community should live. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *Paris Adult Theatre I*, 413 U.S. at 57-63; *Dronenburg v. Zech*, 741 F.2d 1388, 1397 (D.C. Cir. 1984) (Bork, J.). Much law is based on nothing other than moral

views. Sometimes morality combines with instrumental concerns. We accepted as adequate to support legislation the belief that displaying women in a sexually submissive way shapes social patterns to women's detriment. *Hudnut*, 771 F.2d at 328-30. This court held Indianapolis's ordinance unconstitutional only because it distinguished on account of the speaker's viewpoint. Many of the justifications advanced for the Indianapolis ordinance could be offered for restrictions on displays in pubs. Cf. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986). Because the public nudity law does not discriminate on account of viewpoint, it does not have the defect that lead to invalidity in *Hudnut*.

Maybe all of this is rationalization of a law that has no effects beyond depriving *hoi polloi* of a harmless pastime. Maybe not. Ours is not the decision. States may offer different social climates from which the people may select. Indiana has one, Illinois another. Society is the richer when choices increase.

Darlene Miller wants to impress the barflies so they will ply her with drinks. She believes that the impression made by her act varies inversely with the amount of clothing she wears. She is the best judge of her self-interest, but this has nothing to do with the First Amendment. We may doubt the wisdom of requiring women to wear more clothing in the bars of South Bend than in the *Folies Bergère* or on the beaches of Rio de Janeiro without concluding that Indiana has exceeded its powers under the Constitution.

MANION, *Circuit Judge*, with whom COFFEY and EASTERBROOK, *Circuit Judges*, join, dissenting. Today this court holds that "freedom of speech" protects public, nonverbal, nude dancing that communicates no ideas and is considered harmful. Not surprisingly, in their briefs and at oral argument the parties never discussed the text of the First Amendment. Perhaps this is because everyone knows that "Congress shall make no law . . . abridging the freedom of speech"; more likely, it is because reference to the text is a stark reminder of how far First Amendment jurisprudence has gone astray.

Miller should not prevail for two reasons. First, the district court found that the nude dancing at issue contained no "expressive activity." At oral argument Miller's attorney admitted that this dancing communicated no idea or message. The district court's finding was not clearly erroneous, and we should affirm on that basis.[1]

Second, assuming for the sake of argument that striptease contains an expressive element, this statute is valid because the state interest in preventing public nudity—an interest unrelated to the suppression of speech—outweighs whatever expressive elements are contained in a striptease. The majority, by its emphasis on dance, disregards the fact that the challenged statute is not directed at dance but at public indecency, including "appear[ing] in a state of nudity" in a public place. Public nudity is conduct, and is prohibited in every state. Striptease dancers who remove all their clothing become nude in

[1] This is not at odds with Supreme Court precedent. The Supreme Court specifically has declined to rule on the scope of First Amendment protection to be afforded nude dancing. See *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J., dissenting from the denial of certiorari). In *California v. LaRue*, 409 U.S. 109, 117-18 (1972), the Court made clear that conduct such as nude dancing is protected by the First Amendment only when there is a "communicative element," citing *U.S. v. O'Brien*, 391 U.S. 367 (1968). See dissenting opinion of Judge Easterbrook at 93-96.

public, and their conduct violates the statute.[2] The Supreme Court has upheld other content-neutral regulations even though the speech in those cases was much closer to the core of First Amendment protected activity than nude dancing. See *U.S. v. O'Brien*, 391 U.S. 367 (1968) (political protest to the military draft); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (political protest relating to homelessness). Here the state's valid interest in preserving public morality justifies this statute despite its incidental impact on the "limited" First Amendment interests the majority believes are inherent in nude dancing. Majority op. at 8.

The majority finds expression that not even Miller's counsel much less the district court could find. Majority op. at 12. Although we must not ignore original meaning when applying constitutional provisions, we nevertheless cannot turn back the evolutionary clock, powered by case-

---

[2] Public nudity statutes—"indecent exposure" laws—of the type challenged here are widely accepted and usually upheld, even when the challenge is grounded in the First Amendment. See *South Florida Free Beaches v. City of Miami*, 734 F.2d 608 (11th Cir. 1984) (nude sunbathers' argument that state law and city ordinances prohibiting public nudity violated their First Amendment right to demonstrate that "the human body is wholesome and that nudity is not indecent" rejected because the First Amendment does not protect nudity unless combined with some "mode of expression" entitled to First Amendment protection); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976) (nude sunbathing in a national park not protected); *Craft v. Hodel*, 683 F.Supp. 289 (D. Mass. 1988) (women who bared breasts in a political protest of alleged unequal treatment and exploitation of women not protected by First Amendment); *Chapin v. Town of Southampton*, 457 F.Supp. 1170 (E.D.N.Y. 1978) (no First Amendment protection for nude sunbathers who sought to communicate ideas); *Alexander v. Severson*, 408 N.W.2d 195 (Minn. App. 1987) (owner of adult bookstore featuring "exotic dancers" not entitled to injunction to prevent City of Minneapolis from enforcing its indecent conduct ordinance against dancers because no testimony "suggested an attempt to convey ideas" in the dancing); *State v. Turner*, 382 N.W.2d 252 (Minn. App. 1986) (nude sunbathing).

law, that has enlarged the circle of protection of the First Amendment. But we still should consider original meaning if we are to avoid enlarging this circle even more.

In his concurrence, Judge Posner suggests that "original understanding as a guide to constitutional interpretation" changes the Constitution from a "living document" into a "petrified reminder of the limits of human foresight." Concurring op. at 29. Fortunately, with great foresight the framers of the Constitution enacted Article V, which allows adequate "life support" through the amendment process. It takes little foresight to realize that three-fourths of state legislatures would not ratify a Twenty-seventh Amendment that stated "the right of citizens of the United States to entertain by dancing nude in public shall not be denied or abridged by the United States or by any state." It is a much simpler process for a handful of judges to protect nude dancing as entertainment by calling it speech.

Nothing in the Constitution *prohibits* public nudity. Modern legislatures make those decisions in response to the desires of the people. The Constitution grants broad power to legislatures in part because they are best able to respond to changing times and social mores. Legislatures are always free to create new liberties by repealing outdated legislation or passing new laws, and the Constitution has nothing to say about it.

Judge Posner observes that in 1990 America "the project of stamping out nude striptease dancing is quixotic. The power of government is relative to the desires and values of its people. The State of Indiana cannot take the erotic edge off American culture. I doubt that it is even trying to do so." Concurring op. at 47. It should be apparent that the elected representatives of the people of Indiana are much better suited to determining "the desires and values" of their people than those of us who sit on this court. We must assume that if Indiana did not believe nude dancing was a problem, its public nudity statute would be repealed, or at least not used against nude barroom dancing.

This court's decision stands only for the proposition that we know better than the people of Indiana. Nude dancing ought to be legal, therefore it must be protected by the Constitution. At least Judge Posner's concurrence is straightforward:

> Censorship of erotica is pretty ridiculous too. What kind of people make a career of checking to see whether the covering of a woman's nipples is fully opaque, as the statute requires? . . . Many of us do not admire busybodies who want to bring the force of law down on the heads of adults whose harmless private pleasures the busybodies find revolting.

Concurring op. at 38. While that may be true, legislative busybodies can be tossed out of office at the next election. We judges have lifetime insulation from such harsh realities. But since the question is raised, what power does a state have to regulate public morals: what motivates these "busybodies"? Perhaps we should begin where Judge Posner left off—"the power of government is relative to the desires and values of its people." Concurring op. at 47.

Even when First Amendment interests are present the Supreme Court always has recognized the authority of the state to legislate in the interest of protecting community morals. And "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." *California v. LaRue*, 409 U.S. 109, 117 (1972).

In *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), when discussing the use of "fighting words," the Court held that some "utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality." In the obscenity context, Chief Justice Warren wrote of "the right of the Nation and of the States to maintain a decent society. . ." versus "the right of individuals to express themselves freely." *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, Ch.J., dissenting); Justice Brennan in *Roth v. United States*, 354 U.S. 476, 484 (1957) and Chief Justice Burger in *Paris Adult Theatre v. Slaton*, 413 U.S. 49, 61 (1973), "implicitly accepted that a legislature could legitimately act . . . to protect 'the social interest in order and morality.'" *Paris Adult Theatre*, *id.*, citing *Chaplinsky*. The *Paris* Court went on to cite a statement of Justice Holmes, made in a different context:

> [T]he proper course is to recognize that a state Legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the State, and that Courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular Court may happen to entertain.

413 U.S. at 61, n.11, quoting *Tyson & Brother v. Banton*, 273 U.S. 418 (1927) (Holmes, J., dissenting).

Even if interest in public morality—concern for the moral welfare of dancers and patrons—were the only reason for this statute to be applied to nude dancing, that would be sufficient.[3] Certainly legislatures and prosecutors are entitled to consider the effect viewing striptease dances might have on the moral behavior of patrons,[4] in-

[3] We agree with and join Judge Easterbrook's discussion of the majority's attempt to portray this statute as one aimed at nude dancing, rather than as a content-neutral public nudity statute. Nevertheless, because Indiana applies this statute to nude dancing, and that application bothers the majority, we shall examine reasons states and subdivisions of states desire to regulate or prohibit nude entertainment. We do this to emphasize that even if this statute were aimed specifically at nude dancing, the state's valid interest in preserving public morality justifies the statute.

[4] The majority notes that "[d]ance also has biblical roots." Majority op. at 9. While the biblical dancing cited was clearly not of the nude variety, we should point out that the Bible condemned as immoral the behavior Indiana sought to limit here. See Matthew 5:27-28. Fortunately we need only interpret the Constitution.

cluding the potential for damaging marriages and breaking up families by fueling the desire for adultery.[5] In *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986), the plaintiff challenged Georgia's prohibition of sodomy in part because there was no basis for the law

> other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

But there is more here than a concern for the morals of patrons who merely view nude dancing. In *California v. LaRue*, 409 U.S. 109 (1972), the Supreme Court upheld a prohibition on nude dancing in bars based on the regulatory powers granted states by the Twenty-first Amendment.[6] Here in *Miller*, the district court reviewed a videotape of Darlene Miller dancing nude—no customers were present, no one was being "entertained." *LaRue* takes us out of the abstract and into the real world where valid reasons for restricting certain conduct become obvious. Chief Justice Rehnquist described in rather graphic fashion the state's reason for prohibiting nude dancing in bars:

---

[5] See generally *Attorney General's Commission on Pornography Final Report*, Vol. I, at 767-1036 (1986) (discussing the impact of public sexual behavior on pornographic "models" and consumers of pornography, along with the connection between pornography, prostitution, and establishments offering nude dancing).

[6] This court's opinion should be unanimous at least with respect to appellant Miller's dancing at J.R.'s Kitty Kat Lounge. The majority acknowledges that the Indiana statute is not overbroad; this case only involves the specific dances of each appellant. Indiana without question can ban nude dancing in establishments that serve alcohol. Majority op. at 4. Therefore, this statute as *applied* to ban Miller's dancing in a bar that sells alcohol is not unconstitutional. See dissenting opinion of Judge Coffey at 68, n.8.

> Customers were found engaging in oral copulation with women entertainers; customers engaged in public masturbation; and customers rolled currency either directly into the vagina of a female entertainer, or on the bar in order that she might pick it up herself. Numerous other forms of contact between the mouths of male customers and the vaginal areas of female performers were reported to have occurred.
>
> Prostitution occurred in and around such licensed premises, and involved some of the female dancers. Indecent exposure to young girls, attempted rape, rape itself, and assaults on police officers took place on or immediately adjacent to such premises.

409 U.S. at 111. Although Indiana does not compile a legislative history, it is entitled to rely on the experiences of other communities that have dealt with the problems associated with nude dancing. See *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50-52 (1986) (city of Renton was entitled to consider the evidence from other communities of the harmful effects of sexually oriented businesses when enacting its own zoning ordinance). Most communities and states that enact nude dancing regulations report problems similar to those described in *California v. LaRue*, along with other problems such as neighborhood blighting and decreased property values. See *Attorney General's Commission on Pornography Final Report*, Vol. I., at 385-389 (1986) (discussing the problems associated with sexually oriented businesses, including bars with live nude dancing). Judge Posner wonders whether the bar at issue in this case is in South Bend's red light district, and whether South Bend even has a red light district. Concurring op. at 39. The answer to both questions seems to be yes, but the record is not conclusive. The record does indicate that several establishments that challenged the public nudity statute are clustered in the same area on South Michigan Street. A cursory finger-walk through the Yellow Pages (not in the record) would probably disclose similar places along with "adult" bookstores and video parlors. Perhaps a more detailed record (such as

contained in *LaRue* or the Attorney General's report) would emphasize to us what the local people already know. But it should not matter. South Bend's experience cannot be unique; the sheer volume of legislation in this field makes that clear.[7] Indiana's decision to use its public nudity statute to prohibit public nude dancing in bars is justified.

The state has made a moral judgment about public nudity, and consistent with that decision seeks to apply that judgment to public nude dancing. The state has also made moral judgments about bullfighting, dogfighting, gambling and any number of other activities that probably involve some conception of entertainment and expression. If all of these activities are protected to a limited extent by the First Amendment,[8] this court's only justification for suppressing one and allowing the others must be that we agree with the state's decision to ban bullfighting, dogfighting and (some) gambling, but cannot understand why the state would want to prevent nude dancing. Nude dancing is not protected by a stated constitutional provision that a majority of people have subverted at the expense of a minority, requiring the petitioned court to intervene. Rather, this is a valid law which fulfills a perceived need. Determining the wisdom, need, or propriety of laws is the role of an elected legislature, not the federal judiciary. *Griswold v. Connecticut*, 381 U.S. 479, 481-82 (1965).

---

[7] Indeed, this court need only examine its own prior decisions to discover connections between nude dancing establishments and crime, especially prostitution. See *United States v. Marren*, 890 F.2d 924 (7th Cir. 1989); *United States v. Doerr*, 886 F.2d 944 (7th Cir. 1989); *United States v. Muskovsky*, 863 F.2d 1319 (7th Cir. 1988).

[8] Judge Posner admits that bullfighting, although completely banned in every state, is as much "expressive entertainment" as nude dancing: "Bullfighting is forbidden not because it is not expressive, but because in American society its harmful consequences are thought to outweigh its expressive value." Concurring op. at 33.

To summarize, the majority's decision is not compelled by any holding or dicta of the Supreme Court. Neither is it compelled by any reasonable interpretation of the First Amendment. Indiana's prohibition of public nudity can apply to nude dancing that contains no expressive activity. The district court found and counsel for plaintiffs admitted that the dancing at issue does not express anything. Even if nude dancing is considered inherently expressive, Indiana may regulate the nude conduct through its content-neutral statute, because the governmental interest in preventing public indecency and immorality substantially outweighs whatever limited First Amendment rights are implicated by a simple striptease performed for money in bars. The judgment of the district court should be affirmed.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 8, 1990.

Before

HON. WILLIAM J. BAUER, Chief Judge
HON. WALTER J. CUMMINGS, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge
HON. JOEL M. FLAUM, Circuit Judge
HON. FRANK H. EASTERBROOK, Circuit Judge
HON. KENNETH F. RIPPLE, Circuit Judge
HON. DANIEL A. MANION, Circuit Judge
HON. MICHAEL S. KANNE, Circuit Judge

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,	)	Appeal from the United States District Court for the Northern District of Indiana; South Bend Division.
Plaintiffs-Appellants,	)	
Nos. 88-3006 & 88-3244 v.	)	Nos. 85 C 598 & 85 C 353
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLEY HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P.	)	Allen Sharp, Chief Judge

BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,	)
Defendants-Appellees:	)

ORDER

A majority of judges in active service have voted to rehear this case *en banc*. Accordingly,

IT IS ORDERED that rehearing *en banc* be, and the same is hereby, GRANTED.

IT IS FURTHER ORDERED that the judgment and opinion entered in this case on October 19, 1989 be, and are hereby, VACATED. This case will be reheared *en banc* on January 31, 1990 at 10:00 AM.

[887 F.2d 826]

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 88-3006 & 88-3244

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation; and GLEN THEATRE, INC., an Indiana Corporation, GAYLE SUTRO, and CARLA JOHNSON,

Plaintiffs-Appellants,

v.

CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLEY HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Indiana, South Bend Division.
Nos. 85 C 598 & 85 C 353—**Allen Sharp,** *Chief Judge.*

ARGUED MAY 25, 1989—DECIDED OCTOBER 19, 1989

Before WOOD, JR., COFFEY, and FLAUM, *Circuit Judges.*

FLAUM, *Circuit Judge.* These consolidated appeals present the narrow issue of whether non-obscene nude dancing, performed before an audience as entertainment, is

expressive activity and therefore entitled to protection, albeit limited protection, under the first amendment. For the reasons stated herein, we hold that it is.

I.

This matter is before us for the second time and has a somewhat complicated history, both procedurally and substantively. The facts of the cases are presented in detail in the district court's opinion on remand, *Glen Theatre v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988), and in our opinion remanding the *Glen Theatre* matter, *Glen Theatre v. Pearson*, 802 F.2d 287 (7th Cir. 1987). Therefore, we will present a very abbreviated description of the parties and the underlying facts and devote our energy to explaining the pertinent substantive and procedural background.

In 1985, Appellants Glen Theatre, Gayle Sutro, and Carla Johnson filed an action in district court to enjoin the State of Indiana from enforcing its public indecency law against them for presenting nude and semi-nude dancing at an adult entertainment establishment. Sutro and Johnson are dancers at such an establishment owned by Glen Theatre. The statute, on its face, provides for a total ban on nudity in public places.[1] The district court granted the injunction, finding that the statute was facially overbroad.

---

[1] I.C. 35-45-4-1 reads as follows:

I.C. 35-45-4-1. Public indecency.

(a) A person who knowingly or intentionally, in a public place:

(1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;

(3) Appears in a state of nudity; or

(4) Fondles the genitals of himself or another person; commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic areas, or buttocks with less than fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

On the first appeal to this court, we examined the Indiana Supreme Court's decision in *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), *appeals dismissed sub nom. Clark v. State*, 446 U.S. 931 (1979), and *Dove v. State*, 449 U.S. 806 (1980), in which the court had upheld the statute against an overbreadth attack. Essentially, the *Baysinger* court held that Indiana's public indecency statute could be applied to mere conduct but could not be constitutionally applied to expressive activity. Construing the statute to prohibit only non-expressive nudity, the Indiana Supreme Court held that the statute was not overbroad. The court went on, however, to hold that nude dancing of the barroom or striptease variety was mere conduct and thus could be prohibited under the statute.

In reviewing the *Glen Theater* case, we determined that the United States Supreme Court's dismissal of the appeals from *Baysinger* for want of a substantial federal question was binding precedent on the overbreadth issue. We found, however, that the jurisdictional statement presented to the Supreme Court did not include the issue of application, *i.e.*, *Baysinger*'s holding that barroom/striptease dancing is not expressive activity, only mere conduct. We therefore reversed the district court's overbreadth ruling as controlled by *Baysinger*, and, because the district court had not addressed the question of application, remanded the case for a determination of whether the statute could be constitutionally applied to plaintiffs' activity.

In *Glen Theater* we discussed the relevant case law to assist the district court on remand. While we recognized that the Supreme Court has not directly confronted the issue and, therefore, has not explicitly held that nude dancing is expressive activity protected by the first amendment, we reviewed the Supreme Court's decision in *Schad v. Mt. Ephraim*,[2] 452 U.S. 61 (1981). "Although the *Schad*

[2] In *Schad* the Supreme Court invalidated a zoning ordinance that prohibited all live entertainment. The defendants in *Schad* operated an adult bookstore that offered to its customers the opportunity to view a live nude dancer and were convicted of violating the zoning ordinance. The Court held that the ordinance, by restricting all forms of live entertainment, was overbroad and violated the first and fourteenth amendments. In so holding, the Court noted that "[e]ntertainment as well as political and ideological speech is protected by the First Amendment." The Court then discussed the implications of nudity in entertainment and stated: "Nor may an entertainment program be prohibited solely because it displays the nude human figure. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulations." *Glen Theatre*, 802 F.2d at 290 (citations omitted).

(Footnote continued on following page)

court did not decide the extent and scope of protections to be afforded nude dancing, it clearly held that the activity had roots in the First Amendment. Therefore, the language of the opinion certainly calls into question the Indiana Supreme Court's holding in *Baysinger* that nude dancing was merely conduct and as such was not entitled to First Amendment protection." *Glen Theatre*, 802 F.2d at 290 (citations omitted). To place the overbreadth issue in context, we continued:

> However, *Schad* does not disturb the *Baysinger* overbreadth holding. *Schad* is consistent with *Baysinger's* decision that nudity needs to be combined with some sort of expressive activity before it falls within First Amendment protection. "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment."

Id. (citations omitted). *See New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718-19 (1981) (Stevens, J., dissenting); *Young v. Arkansas*, 474 U.S. 1070, 1071-72 (1986), (White, J., dissenting from denial of certiorari) (recognizing the Court's "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment" and urging an explicit holding to that effect); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975) (stating that "[a]lthough customary 'barroom' type of nude dancing may involve only the

[2] *continued*

barest minimum of protected expression, we recognized in *California v. LaRue*, 409 U.S. 109, 118 (1972), that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances.").

We further pointed out that several circuits have held that nude and semi-nude barroom dancing as well as other forms of nude entertainment are entitled to first amendment protection.

> For example, the Eleventh Circuit . . . citing *Schad* . . . stated, '[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before pay[ing] customers and not . . . casual viewers.' *International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520, 1525 (1986). Earlier in *Krueger v. Pensacola*, 759 F.2d 851, 854 (1985), the Eleventh Circuit had recognized that topless dancing was a form of expression protected by the First Amendment. The *Krueger* court noted that the Supreme Court has consistently evaluated any potential artistic or communicative activity (including topless dancing) under First Amendment standards. *Id.* at 854 & n.4 . . . see also *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (allowing extensive time, place, and manner regulation of topless entertainment); *Avalon Cinema Corp. v. Thompson*, 658 F.2d 555 (8th Cir. 1981); *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Chapin v. Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978).

Glen Theatre, 802 F.2d at 290-91.

Having thus laid the groundwork for the district court, we remanded the case with instructions to "examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole the activity should be afforded First Amendment protection." On remand, the district court consolidated the *Glen Theatre* matter with the *Miller* action and a third pending case. The latter two suits were brought by plaintiffs seeking to present nude and semi-nude dancing at their lounges. Darlene Miller is a dancer at the "Kitty Kat" lounge.

After reviewing a videotape of the plaintiffs' proposed dancing,[3] the district court, apparently taking our instruction to require a determination as to the degree of expression embodied in a particular dance routine, held that because "these strip tease dances are not performed in any theatrical or dramatic context," the dancing was not expressive activity and therefore was without first amendment protection. The plaintiffs in *Glen Theatre* and *Miller* appealed.

II.

When a court grapples with a delicate and emotionally charged issue, sometimes, unavoidably, an unintended ambiguity may find its way into an opinion. A careful reading of the opinion, however, ordinarily will clarify any question. In this case, although we might have been more precise in our instruction on remand and substituted the words "activity they wish to engage in" for "dancing they wish to perform," on the whole we believe our guidelines were misread. As we explained in *Glen Theatre*, the case law points to the conclusion that non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection. Given the posture of the case, however, we thought it appropriate that the district court make the initial determination of whether the State of Indiana was, in fact, seeking to enforce its statute to prohibit nude dancing as entertainment, and thus limit plaintiffs expression. We did not intend for the district court to make a qualitative judgment as to the aesthetic appeal or artistic merit of a particular dance routine.

---

[3] The State briefly and half-heartedly argues that the videotape portrayed only the *Miller* plaintiffs' dancing and not the *Glen Theatre* plaintiffs' proposed dancing. At oral argument, however, the State conceded that all of the dances at issue are non-obscene striptease dance routines.

We believe that the district court's construction of whether the statute's application violates the plaintiffs' free speech rights was clearly erroneous. It was established on remand (and conceded by the State at oral argument) that the plaintiffs wished to present non-obscene nude dancing of the barroom/striptease variety. As the Second Circuit has stated:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person [at the local pub].

Salem Inn, Inc. v. Frank, 522 F.2d 1045 (2d Cir. 1975) (quoting *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *aff'd in part, Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975)).[4] In substance, nude-dancing is still expression. We recognized in *Glen Theatre* what the Supreme Court made clear in *Schad*: " '[n]udity alone' does not place otherwise protected material outside the mantle of the First Amendment." 452 U.S. at 66. Nor does the fact that a dance is sexual remove the mantle of protection. "Sexual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications of California, Inc. v. Federal Communications Commission*, 109 S.Ct. 2829, 2836 (1989). Therefore, nude-dancing as expression falls within the protection of the first amendment.

Our reading of these precedents constrains us to conclude that the Supreme Court would not permit Indiana

[4] The State also argues that not all entertainment is expressive and pointedly offers as examples cock-fighting and bear-baiting. We need not address that issue, for the basis of our holding is that *dance* is expression. We have framed the issue in terms of "dance as entertainment" in order to narrowly and accurately represent the facts of the case and to distinguish dance as an art or entertainment form from such things as social dancing or, say, aerobic dance/exercise. We express no opinion as to the expressive content of those activities.

to apply its public nudity statute to the activity these plaintiffs wish to engage in. What we have in this case are plaintiffs who wish to present non-obscene nude dancing as expressive entertainment. As such, no matter how little artistic value may be found in such performances, it is entitled to limited protection under the first amendment. This is not to say, of course, that the State is powerless to regulate the presentation of nude dancing. On the contrary, the State has a great deal of power. A government may impose reasonable time, place, and manner restrictions on protected expression. *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 46-47 (1986). Similarly, it may regulate the nonexpressive conduct for reasons unrelated to the suppression of speech. *United States v. O'Brien*, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted it by the Twenty First Amendment. *California v. LaRue*, 409 U.S. 109 (1972). And it may totally ban obscene nude dancing. *Sable Communications*, 109 S.Ct. at 2835.

The State has admitted that the dance involved in this case is non-obscene but it has not presented any legitimate grounds for defending the statute. Thus, the ban at issue here does not fall within any of those categories of legitimate legislation. If the State wishes to regulate non-obscene expressive activity, it may do so, but within the bounds of the first amendment.

III.

Accordingly, the judgment of the district court is REVERSED, and the case is remanded for the entry of orders enjoining the State from enforcing I.C. 35-45-4-1 against these plaintiffs to prohibit non-obscene nude dancing as entertainment.

[695 F. Supp. 414]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation; GAYLE ANN MARIE SUTRO; and CARLA JOHNSON,,

Plaintiffs

v.) Civil No. S 85-353

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants

* *

DARLENE MILLER; and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,

Plaintiffs

v.) Civil No. S 85-598

CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P.

BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants

* *

SANDY DIAMOND; LYNN JACOBS; 720 CORPORATION, an Indiana Corporation, and 726 CORPORATION, an Indiana Corporation,

Plaintiffs

v.) Civil No. S 85-722 (Consolidated)

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Defendants

* *

MEMORANDUM AND ORDER
[September 9, 1988]

This case is before the court on remand from the Seventh Circuit Court of Appeals. In a Memorandum and Order signed by this Judge on July 26, 1985, defendants were preliminarily enjoined from arresting or prosecuting or threatening to arrest or prosecute plaintiffs. On October 10, 1985, a permanent injunction was issued. The injunction was appealed and on

September 30, 1986, the Seventh Circuit, speaking through Chief Judge Cummings, reversed this court's order and remanded the matter. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986). This court consolidated the *Glen Theatre* case with *Miller v. City of South Bend*, Cause Number S 85-598, and *Diamond v. City of South Bend*, Cause Number S 85-722. A hearing was held in open court on January 11, 1988. At that time this Judge set deadlines for filing briefs and proposed findings of fact and conclusions of law by all parties. Those briefs have since been filed and oral argument was heard on July 15, 1988, at which time this court took the matter under advisement. It is now prepared to render its decision in this case.

I. Findings of Fact

This court adopts the findings of facts as set forth in its Memorandum and Order in the *Glen Theatre* action, which was dated July 26, 1985. The relevant portion of that Memorandum and Order is attached hereto as Appendix "A".

This court also adopts the statement of facts set forth by Judge Robert L. Miller, Jr. in his Memorandum and Order in the *Miller* case, Cause Number S 85-598, dated May 5, 1986. The relevant portion of that Memorandum and Order is attached hereto as Appendix "B".

Finally, this court adopts the fact findings as stated by Judge Miller in his Memorandum and Order in the *Diamond* case, Cause Number S 85-722, dated May 5, 1986. The relevant portion of that Memorandum and Order is attached hereto as Appendix "C".

II. Conclusions of Law

The concept of the "law of the case" has specific application here. An inferior court must apply the decision of the superior appellate court. *United States of America v. City of Chicago*, No. 87-1973, 87-2076, slip op. at 6 (7th Cir. August 3, 1988). The

decision of the Seventh Circuit Court of Appeals in this case has at least two salient features. First, it specifically cited with approval the decision of the Supreme Court of Indiana in *State of Indiana v. Baysinger*, 397 N.E.2d 580 (1979). Secondly, it reversed this court's decision which had been based on First Amendment considerations. The composite effect of the decision of the Court of Appeals in this case is to create narrow constraints for this court's present decisional process. The Seventh Circuit mandate, which was spelled out at the end of the opinion was instructive:

> The district court should examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection.

In the preceding paragraph of the opinion, the court said:

> Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment and outside the reach of the public nudity statute as construed by *Baysinger*.

As this court understands these words, the type of dancing performed by these particular plaintiffs should be scrutinized by this Judge, who must then decide whether such activity is protected under the First Amendment. The plaintiffs in Cause Numbers S 85-722 and S 85-598 submitted a videotape as evidence of the type of dancing they wish to perform.[1] Plaintiffs in Cause Number S 85-353 apparently also incorporated that video tape as evidence of the dancing they wanted to perform. *See* "Supplemental Brief of Plaintiffs Darlene Miller and Jr.'s Kitty Kat Lounge, Inc." at page 3 ("The parties have agreed to

[1] The fact that some of the dancers wish to perform in establishments that serve alcohol is irrelevant here. The statute in question applies to public nudity and does not include any reference to establishments which serve alcoholic beverages. If that were the case, the Twenty-first Amendment of the Constitution of the United States would come into play.

incorporate proof offered by them at the hearings of March 11, 1986 as part of the record of this case."). It should be noted at this point that plaintiffs' counsel conceded in open court on July 15, 1988, that the Glenn Theatre, formerly located at 500 West Chippewa Avenue, was very recently destroyed by fire. Therefore, the cause of action has become moot as to that plaintiff. *See, DeFunis v. Odegaard*, 416 U.S. 312 (1974).

This court has viewed the entire videotape which was entered into evidence. The tape consists of four separate performances. The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts. This court must determine whether such acts are protected by the First Amendment.

This court is writing on anything but a clean slate. Many courts in this state, and most other states, have addressed the subject of public nudity in a First Amendment context. Three basic premises are universally accepted. First, clearly all nudity is not obscene. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213 (1975). Second, nudity which is obscene is not protected. *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476, 484-485 (1957); *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 324 (7th Cir. 1985). Third, some forms of nude dancing are clearly protected. *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981) ("nude dancing is not without its First Amendment protections from official regulations.")[2] Apart from those premises, however, the decisions throughout the country, although not always entirely clear, have been moving in the general direction of finding particular instances of nude dancing constitutionally protected. *See, e.g., International Food & Beverage Systems v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (Nude dancing constitutionally protected expression, at least if performed indoors before pay customers); *BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (Barroom nude dancing can be expressive activity entitled to First Amendment protection and nudity alone is not sufficient to make that dancing legally obscene); *Birkenshaw v. Haley*, 409 F.Supp. 13, 18 (E.D. Mich. 1974) (Not all forms of nude or semi-nude behavior are embodied with sufficient communicative content to warrant the protection of the First Amendment.). *See also*, Been, *Erhardt v. State: Nude Dancing Stripped of First Amendment Protection*, 19 Ind. L.Rev. 1 (1986), in which the author concludes that Indiana's Public Indecency Statute encroaches upon legitimate expression involving public nudity and cites this court's original opinion finding the statute unconstitutionally overbroad as support for his contention that "professional dancers may seek protection for their communication in a federal forum where the law may be more sensitively applied and where first amendment rights may be zealously guarded." *Id.* at 15.

This court is required to apply Indiana law to the facts of this case. It is also required to follow precedent set by the Seventh

---

[2] Schad did not explicitly find that non-obscene nude dancing was always constitutionally protected nor has any Supreme Court of the United States case directly confronted the question. In 1986, Justice White, in his dissent to *Young v. Arkansas*, ____ U.S. ____, 106 S.Ct. 830, 832 (1986), in which the court denied certiorari, stated that he believed that it was time for the court to address the question due to the disagreement in the state courts over the reach of the First Amendment in this area. The Supreme Court of the United States has still not directly confronted this issue. It has simply acknowledged that nude dancing is entitled to some First Amendment protection. *Schad v. Mt. Ephriam*, 452 U.S. 61 (1981); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975); *Southeastern Promotions, Ltd. v. Conrad*, 410 U.S. 546 (1975); *California v. LaRue*, 409 U.S. 109 (1972).

Circuit and to follow the "law of the case."[3] The law in Indiana was set forth clearly in two Supreme Court of Indiana cases, *State of Indiana v. Baysinger*, 397 N.E.2d 580 (Ind. 1980) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). The *Erhardt* case involved the same statute with which this court is dealing, I.C. §35-45-4-1. Ruth Erhardt entered a contest to be named "Miss Erotica of Fort Wayne" which was held at the Cinema Blue Theatre on February 25, 1982. The contest included a dance competition at which Erhardt danced to two songs. During the first, she wore a short negligee and panties. For the second number, she stripped down to nothing but a g-string and scotch tape criss-crossed over her nipples. She was arrested for public indecency. *Erhardt v. State*, 463 N.E.2d 1121, 1122 (Ind.App. 4 Dist. 1984), *rev'd* 468 N.E.2d 224 (Ind. 1984). The Indiana appellate court held that the dancing was protected by the First Amendment and that Erhardt could not be convicted of public indecency under IC §35-45-4-1. The Supreme Court of Indiana reversed saying that the evidence brought Erhardt's conduct squarely within the prohibitions of the statute which was constitutional under *Baysinger*. In *Baysinger*, three cases were consolidated which all involved nude dancing or appearances in bars. The court found that the Indiana public indecency statute was constitutional in view of case law which restricted and defined the conduct to be prosecuted under the statute. *Baysinger*, 397 N.E.2d at 587. The statute, therefore, was not overbroad but was constitutional as a valid exercise of police powers of the state. *Id.* With regard to nude dancing, the court conceded that other jurisdictions had found similar statutes unconstitutional:

[3] The "law of the case" may not technically apply here because the Seventh Circuit considered only the situation in the *Glen Theatre* action which this court has found to be moot due to the destruction of the Glen Theatre several months ago (*see infra*). However, while the court recognizes this technical distinction, it feels constrained to follow the Seventh Circuit's mandates in ruling on the remaining cases which were consolidated with *Glen Theatre* after that case was remanded to this court.

> We recognize the existence of cases cited by the appellees to indicate that some courts have held that the regulation of nude dancing through public indecency statutes or ordinances, when such laws are not tied to the regulation of alcoholic beverages, may be unconstitutional. *See New York Topless Bar and Dancers Assoc. v. New York State Liquor Authority*, 91 Misc.2d 780, 398 N.Y.S.2d 637, 637 n. 2 (N.Y.Sup.Ct. 1977); *People v. Nixon*, 88 Misc.2d 913, 390 N.Y.S.2d 518 (Sup.Ct. 1976); *Lucifer's Gate, Inc. v. Town of Van Buren*, 88 Misc.2d 790, 373 N.Y.S.2d 304 (Sup.Ct. 1975). Other courts in other jurisdictions have held similar statutes to be overbroad, *Jamaica Inn, Inc. v. Daley*, 53 Ill.App.3d 257, 11 Ill.Dec. 28, 368 N.E.2d 589 (1977). Other courts have attempted to construe the term public place in public indecency laws to exclude places where persons willingly enter. *See Yauch v. State*, 109 Ariz. 576, 514 P.2d 709 (1973); *State v. Brooks*, 275 Or. 171, 550 P.2d 440 (1976). *Id.* at 585.

However, the Indiana Supreme Court decided otherwise:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that

they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances. Under these facts the argument that Ind.Code §35-45-4-1 (Burns 1978) is overbroad must fail. Certainly the presumption of constitutionality with which each statute is clothed is not clearly overcome. We reverse the judgments of the lower courts, order the injunctions issued to be lifted, and declare Ind.Code §35-45-4-1 to be constitutional as a valid exercise of the police powers of the state.

Id. at 587. The Seventh Circuit, in reversing this court's decision finding the Indiana statute unconstitutionally overbroad, pointed out that *Baysinger* and other Indiana case law sufficiently narrowed the reach of the statute to those instances of public nudity in which conduct, and not expression was involved.[4] There is nothing left for this court to decide but

[1] The Seventh Circuit pointed out that the *Baysinger* appeal had been summarily dismissed by the Supreme Court of the United States in *Clark v. State*, 446 U.S. 931 (1980) and *Dove v. State*, 449 U.S. 806 (1980) for want of a substantial federal question. The court noted that the Supreme Court of the United States' summary dismissal is a ruling that the Indiana statute, as interpreted in *Baysinger*, is constitutional in the face of an overbreadth attack because a summary dismissal rejects only the specific challenges presented in the statement of jurisdiction filed with the Supreme Court of the United States and in *Baysinger*, those challenges raised the issue of overbreadth. Therefore, the Supreme Court of the United States rejected the overbreadth challenges. *Glen Theatre v. Pearson*, 802 F.2d 287, 288-289 (7th Cir. 1986).

whether the nudity in question is expressive activity protected by the First Amendment.[5]

The *Baysinger* court looked at two major factors to determine whether the nudity was expressive activity. First, it considered the context of the dance presentation. The fact that the dancing was not part of a play or dramatic performance was deemed highly significant. *California v. LaRue*, 409 U.S. 109 (1972) was distinguished:

> We read *LaRue* to caution against attempting to censor dramatic performances in theaters or in movies, which may be protected expression. As noted in *Crownover v. Musick*, (1973) 9 Cal.3d 405, 107 Cal.Rptr. 681, 509 P.2d 497, *cert. den. sub. nom.*, *Owen v. Musick*, 415 U.S. 931, 94 S.Ct. 1443, 39 L.Ed.2d 489 (1974):
>
> > "A close reading of the *LaRue* opinion reveals that the only area of regulation involved in that case which the Supreme Court found 'within the limits of the constitutional protection of freedom of expression' was that of motion pictures and theatrical productions."
>
> *See also Gabriel v. Town of Old Orchard Beach*, 390 A.2d 1065 (Me. 1979); *People v. Karns*, 81 Misc.2d 186, 365 N.Y.S.2d 725 (Cty.Ct.Rochester, Monroe Co. 1975); *Kew v. Senter*, 416 F.Supp. 1101 (N.D.Tex. 1976).

Baysinger, 397 N.E.2d at 585.

[5] Whether the nude dancers perform in a "public place" as that term is used in the statute is not at issue here. There is no question, under Indiana law, that the businesses in question constitute public places. In *Baysinger*, the court reiterated its finding in *Peachy v. Boswell*, 240 Ind. 604, 167 N.E.2d 48 (1960), that a public place is "any place where the public is invited and are free to go upon special or implied invitation — a place available to all or a certain segment of the public." *Baysinger*, 397 N.E.2d at 583. Even a movie-viewing booth located in an adult bookstore which had a "glory hole" in one wall of the booth through which a defendant exposed his genitals was found to be a public place in *Thompson v. State*, 482 N.E.2d 1372 (Ind.App. 1985). *See also, Adams v. State*, 461 N.E.2d 740 (Ind.App. 1984), where the court found that private viewing booths with lockable doors with "in use" lights above the doors and which encircled a stage where nude dancers performed constituted a "public place."

The court also considered the fact that the dancers' claimed injury was economic in nature.[6] They complained that they made less money appearing scantily clad than they could make appearing nude. They did not claim that there was any pure speech involved in their appearances.

Unlike the *Baysinger* dancers, the dancers in this case have claimed that their First Amendment rights have been violated. They contend that their dancing is a form of expressive activity protected by the First Amendment. After viewing the proffered evidence, this court must conclude that in light of the Indiana Supreme Court decisions, the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States. These strip tease dances are not performed in any theatrical or dramatic context. Further, their conduct falls squarely within the prohibitions of Indiana's Public Indecency statute, which has been found constitutional.

This court cannot find any constitutionally protected expression in these performances, and must conclude that the dances are mere conduct. Judgment shall be entered in favor of the defendants. All costs assessed against the plaintiffs. IT IS SO ORDERED.

DATED: September 9, 1988

/s/ Allen Sharp
CHIEF JUDGE
UNITED STATES DISTRICT COURT

---

[6]The *Baysinger* court did not consider whether the dances might be "commercial speech" which may be protected under the First Amendment. *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 68-69 (1976). That argument has not been raised in the case now before this court. Therefore, it will not be considered. Other courts, however, have found that nude dancing is not commercial speech. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (1986).

APPENDIX "A"

I. FINDINGS OF FACT

Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings and live entertainment at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana called the Chippewa Bookstore. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showings of the female body through glass panels. The customers would sit in a booth and insert coins in a timing mechanism that permitted them to observe the live nude and semi-nude dancers for a period of time. This live entertainment is offered to fee-paying consenting adults over the age of 18 and no accidental viewing by any non-consenting person of the live nude and semi-nude entertainment is possible. No alcoholic beverages are sold, consumed or allowed on the Chippewa Bookstore premises. Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

In a period of about two years from March 1983 to March 1985, there were approximately eleven arrests of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1(a) for appearing in a state of nudity. All those who have been arrested have been prosecuted and at least five of those persons have been convicted of violating the Indiana public indecency statute and have unsuccessfully appealed their conviction to the Indiana Court of Appeals and Indiana Supreme Court. The latest arrests occurred on March 27, 1985 at which time two females were arrested by the South Bend Police Department and charged by the prosecuting attorney with violating I.C. §35-45-4-1. None of the plaintiffs in this case are the subject of criminal charges pertaining to the issues in this case.

As a result of the raids of March 27, 1985, the Chippewa

Bookstore has discontinued the showing of any live nude entertainment. Glen Theatre, Inc. had scheduled Gayle Ann Marie Sutro (Sutro) to perform a nude dance production throughout the summer and fall of 1985 in conjunction with a South Bend area showing of one of her motion picture films at the Chippewa Drive-In. Sutro is a professional actress, stunt woman and ecdysiast and has studied acting, dancing, speech and language. She has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA. In her affidavit, Sutra stated that her nude dances are appropriately choreographed and are an attempt to communicate as well as to entertain.

Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet.

APPENDIX "B"

II. FACTS

A. S85-598

Cause number S85-598 is a suit for preliminary and permanent injunction brought by Darlene Miller and JR's Kitty Kat Lounge, Inc. ("Kitty Kat") against the City of South Bend, the Indiana Alcoholic Beverage Commission, South Bend's police chief, the prosecuting attorney for the county in which South Bend is located, and Indiana's Attorney General. Ms. Miller and the Kitty Kat contend that IC 35-45-4-1(a)(3) deprives them of their First Amendment right to present nude entertainment.

At the hearing on the preliminary injunction, the plaintiffs presented the testimony of Ms. Miller and Arthur Ford, who is the sole stockholder of the Kitty Kat. Their testimony, which was unrebutted, established the following:

The Kitty Kat sells alcoholic beverages and presents "go-go" dancing. The Kitty Kat made approximately $51,000.00 in 1985. Mr. Ford wants to present nude dancing to his patrons, but the Kitty Kat currently presents no "totally nude dancing". The Kitty Kat does not, and nobody intends for it to, present plays, ballet or the works of Shakespeare.

The Kitty Kat's dancers are not paid an hourly wage; instead they work on commissions: they receive 100% commissions on the first $60.00 in drink sales during their performances, and Mr. Ford keeps a careful accounting of the amount received by each dancer. The length of their working hours depends upon the number of dancers present. Mr. Ford cannot compel the Kitty Kat dancers to dance nude, although he may terminate the contract of a dancer who refuses to do so.

On July 27, 1985, Mr. Ford read of the issuance in another case, see Part V-C, *infra*, of an injunction against enforcement of the public indecency statute, and decided to present some nude entertainment. Kitty Kat dancers danced nude until about 2:50 a.m., when South Bend police officers informed Mr. Ford that arrests would be made if the nude dancing continued. The nude dancing stopped; no arrests were made. The Kitty Kat has never been engaged in a criminal case, at least not since Mr. Ford purchased the business in 1981.

Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing". The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go", sometimes fast, sometimes slow. She dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest. She danced nude on July 27, 1985 until the police arrived. Ms. Miller has no prior or pending criminal charges.

APPENDIX "C"

B. S85-722

Cause number S85-722 is a suit for preliminary and permanent injunctive relief brought by Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") against the same defendants as in cause number S85-598. These plaintiffs, too, contend that IC 35-45-4-1(a)(3) deprives them of their First Amendment right to present nude entertainment. They also appear to raise an allegation that the statute is overbroad.

At the hearing on the motion for preliminary injunction, the plaintiffs presented the testimony of Ms. Jacobs, Ms. Diamond and George Herring, who is secretary of Ramona's Car Wash and Ace-Hi Lounge and one of the corporations' two shareholders. Mr. Herring manages those establishments. Their testimony, which was unrebutted, established the following:

Ramona's Car Wash and Ace-Hi Lounge sell alcoholic beverages and present what Mr. Herring termed "exotic dancers". Ramona's Car Wash and Ace-Hi Lounge advertise alcohol and dancers; their wares are apparent to passers-by. Ramona's Car Wash and Ace-Hi Lounge hires "go-go" girls locally, and uses talent agencies to bring in dancers from other police to present "Vegas-style" acts. Ballet and Shakespeare plays are not presented at Ramona's Car Wash and Ace-Hi Lounge, but Mr. Herring noted that some of the dancers do comedy routines or a "little girl act".

Dancers at Ramona's Car Wash and Ace-Hi Lounge are not allowed to dance totally nude because the owners fear criminal prosecution. In July, the owners planned to present nude dancers in light of an injunction issued in an unrelated case, see Part V-C, *infra*, but South Bend police officers warned them not to do so. The owners of Ramona's Car Wash and Ace-Hi Lounge believe that presenting "totally nude" dancing would be good for business and bring in more customers. Mr. Herring conceded, however, that he has never worked in a tavern that

presented nude entertainment, and was unaware of any local drinking establishment that features nude dancers.

Ramona's Car Wash and Ace-Hi Lounge have been involved in an arrest for underage drinking, but never in arrests for violation of the public indecency statute.

Ms. Jacobs is among the dancers featured at Ace-Hi Lounge. She describes herself as a "go-go" dancer. Ms. Jacobs dances for fifteen to twenty minutes as a juke box plays four songs. She buys outfits to wear when she dances, but her act consists of removing the outfits. Her act features no choreography: she simply takes the stage and dances. Ms. Jacobs believes she entertains the patrons in the establishment: they come in to see her, they applaud, they buy her drinks in appreciation of her performance. Her pay depends upon the number of drinks purchased, and she must sell a certain number of drinks to be paid. In a good week, Ms. Jacobs earns $500.00 to $600.00; in a bad week, she makes $100.00 less.

Ms. Jacobs does not dance nude; Ace-Hi management has instructed her not to dance nude for fear of prosecution. She wants to dance nude to produce more money for herself and for Ace-Hi Lounge, and she will dance nude if the injunction is granted in this case.

Ms. Diamond has worked at Ramona's Car Wash intermittently since February, 1985. She describes herself as an "exotic dancer". Ms. Diamond has traveled as an "exotic dancer" for seven years, and spent the previous four years in the Academy of Ballet. She has worked as an "exotic dancer" in many places in the continental United States, Canada, Guam, Puerto Rico and Japan. She has acted as an extra in motion pictures and on the Hawaii Five-O television show.

Ms. Diamond does not dance nude at Ramona's Car Wash; management has ordered her not to for fear of prosecution. In her seven years as an "exotic dancer", this is the third place she has found in which she cannot dance nude. In her local performances, Ms. Diamond removes her clothing to reveal "pasties"

and a "g-string"; occasionally, avowedly for theatrical effect, she leaves her gloves on as well. Ms. Diamond dances in costumes designed for her acts; she dances to her own taped music. Her acts are designed to "create a fantasy in the minds" of her patrons. She perceives herself to be acting when she dances, and believes, based upon the applause she receives, that she entertains those who see her perform. She will dance nude if the injunction is granted.

Ramona's Car Wash hires Ms. Diamond through Universal Entertainment of Massachusetts. She earns a weekly salary of $600.00, plus 25% of all drinks after the first $600.00; the agency receives a ten percent commission. She sells in the neighborhood of $900.00 in drinks each week she works. Ms. Diamond conceded that she can make more money elsewhere, but she prefers to work close to her South Bend home. Her base salary is not necessarily increased when she dances nude; that salary depends upon her publicity, recent films, costumes, and other considerations. Ms. Diamond's contract with Ramona's Car Wash prohibits nude dancing, but the contract could, according to Ms. Diamond, be amended easily.

* *

MEMORANDUM AND ORDER
[ON MOTION TO ALTER OR AMEND JUDGMENT]
[October 21, 1988]

This court issued a Memorandum and Order which was the final disposition on the merits of the three above cause-numbered cases, on September 9, 1988. Judgment was entered on September 13, 1988. Plaintiffs Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson filed and served upon defendants' counsel a Motion to Alter or Amend Judgment presumably under Rules 52(b) and 59(e), Federal Rules of Civil Procedure (Fed.R.Civ.P.), on September 28, 1988.

Rule 59(e) requires that:

> "A motion to alter or amend the judgment shall be served not later than 10 days after entry of the judgment."

Rule 52 (e) has a similar time requirement:

> "Upon motion of a party made not later than 10 days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly."

It is well settled that the ten-day period is mandatory under both sections and cannot be extended by the district court. *See, e.g., Marane, Inc. v. McDonald's Corp.*, 755 F.2d 106, 111 (7th Cir. 1985); *Wort v. Vierling*, 778 F.2d 1233, 1234 (7th Cir. 1985); *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 827 (7th Cir. 1984). It should also be pointed out that untimely motions under Rule 52(b) or Rule 59(e) do *not* extend the period for filing notice of appeal. *See, e.g., Marane*, 755 F.2d at 110; *Glass v. Seaboard Coast Line R. Co.*, 714 F.2d 1107, 1108 (11th Cir. 1983); *Biggs v. Roberts*, 213 F.2d 893 (7th Cir. 1954) (Untimely motion cannot toll the running of the time for appeal). Plaintiffs' motion is untimely under either Rule 59(e) or Rule 52(b). The ten-day limit ended on September 27, 1988, one day before the motion was served and filed as computed pursuant to Rule 6, Fed.R.Civ.P. Note that the additional three days provided by Rule 6(e) do not apply to judgments which are not the subject of "service", whether or not the mails were used to transmit the judgment from the clerk to a party. *Flint v. Howard*, 464 F.2d 1084, 1087 (1st Cir. 1972). Even if the motion were timely, it has no merit. Plaintiffs are simply attempting to present the same arguments one last time. Plaintiffs' Motion to Alter or Amend Judgment must be DENIED.

Although the greater part of plaintiffs' motion addresses the substantive issues of this case, at least one portion of the motion is mischaracterized as a Rule 59(e) motion because it concerns a factual error made by this court, rather than a legal error. This move to correct a factual mistake should and will be

considered a motion under Rule 60(b)(1).[1] The court stated in its opinion of September 13, 1988, that "plaintiffs' counsel conceded in open court on July 15, 1988, that the Glen Theatre, formerly located at 500 West Chippewa Avenue, was very recently destroyed by fire. Therefore, the cause of action has become moot as to that plaintiff." The court based this statement on the following exchange which occurred in open court on July 15, 1988, between this Judge and Mr. Robert C. Rosenfeld, attorney for defendants City of South Bend and Charles Hurley, Chief of Police:

> **Mr. Rosenfeld:** . . . There is only one thing in all fairness I need to bring to the court's attention that I found out by reading the paper last night.
>
> **The court:** You are not even in the Glen Theatre case. Yes, you are.
>
> **Mr. Rosenfeld:** Yeah, we are. Factually, Your Honor, there was a fire at Glen Theatre. I don't know what effect it has on this case.
>
> **The Court:** Why are you telling me about it then?
>
> **Mr. Rosenfeld:** Except Glen Theatre doesn't exist as a physical entity right now.
>
> **The Court:** Has that got something to do with this case?
>
> **Mr. Rosenfeld:** Only in the fact that an injunction matter . . .
>
> **The Court:** Are you trying to moot it out?
>
> **Mr. Rosenfeld:** I am not sure.
>
> **The Court:** You are in a United States District Court. Now you either got something important to say or you haven't. I read the paper too. I don't live in a vacuum. Does that have something to do with the issues in the case?
>
> **Mr. Rosenfeld:** Not the issues presented, Your Honor.
>
> **The Court:** Let's get on then.

[1] Rule 60. Relief from Judgment Or Order

(b) Mistakes; Inadvertence; Excusable neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such items as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: (1) *mistake, inadvertence, surprise or excusable neglect.*

Plaintiffs never challenged that exchange because, as explained in the Motion to Alter and Amend, counsel thought it unnecessary to respond to a motion to dismiss on grounds of mootness which was never properly raised. The affidavit of Roger Judd, president of Glen Theatre, Inc., which was filed in support of the Motion to Alter or Amend states that the fire did not in fact destroy the entire business premises of the Glen Theatre which continues to operate its business. Based on that affidavit, this court now nullifies *only* that part of the opinion which found the cause moot as to the Glen Theatre. It should be emphasized that this action is being taken pursuant to Rule 60(b)(1) to correct a factual mistake that affects the substantive rights of the parties. This court has no choice but to deny an untimely Rule 59(e) motion. However, because part of that motion was mischaracterized and was, actually, a Rule 60(b)(1) motion, this court grants relief under Rule 60(b)(1) for a factual mistake. The finding of mootness is VACATED and the judgment shall therefore apply in full to the Glen Theatre, as well as the plaintiffs who perform there. IT IS SO ORDERED.

DATED: October 21, 1988

/s/ Allen Sharp
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

[802 F.2d 287]

IN THE

United States Court of Appeals

For the Seventh Circuit

No. 85-3029

GLEN THEATRE, INC., an Indiana Corp.;
GAYLE ANN MARIE SUTRO and CARLA JOHNSON,

Plaintiffs-Appellees,

v.

LINLEY E. PEARSON, Attorney General of Indiana,
and MICHAEL P. BARNES,

Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division.
No. 85 C 353—**Allen Sharp,** *Chief Judge.*

ARGUED APRIL 18, 1986 — DECIDED SEPTEMBER 30, 1986

BEFORE CUMMINGS, *Chief Judge,* EASTERBROOK, *Circuit Judge,* and NOLAND, *Chief District Judge.**

CUMMINGS, *Chief Judge.* This appeal calls into question the validity of Indiana's public nudity statute, Indiana Code §35-45-4-1. The plaintiffs protest that the breadth of the statute chills their First Amendment right of free speech. The district

* The Honorable James E. Noland, Chief District Judge for the Southern District of Indiana, is sitting by designation.

court agreed and permanently enjoined defendants from enforcing the statute. Because the Indiana Supreme Court has interpreted the statute to protect First Amendment expression, we reverse and remand.

Statement of the Case and Facts

Plaintiffs filed suit seeking to enjoin the State of Indiana from enforcing its public indecency law[1] against them for nude entertainment. The plaintiffs include Glen Theatre, a business that wants to provide nude entertainment to its customers, and two performers, Gayle Ann Marie Sutro and Carla Johnson. On July 26, 1985, after finding the statute facially unconstitutional for overbreadth, the district court entered a preliminary injunction prohibiting the defendants from arresting and prosecuting the plaintiffs under Indiana Code §35-45-4-1(a)(3). On October 10, 1985, the district court entered a permanent injunction. The defendants appeal from the district court's order. We have jurisdiction under 28 U.S.C. §1292(a).

Plaintiff Glen Theatre is an Indiana corporation that owns an adult entertainment business called the Chippewa Bookstore. The Bookstore provides adult books and magazines, movie showings, and live entertainment. The live entertainment consists of nude and semi-nude performances through glass panels. By inserting coins into a timing mechanism the customers are permitted to observe the nude dancers. No alcoholic beverages are sold, consumed, or allowed on the Bookstore prem-

[1] Ind. Code §35-45-4-1 provides:

(a) A person who knowingly or intentionally, in a public place:
(1) Engages in sexual intercourse;
(2) Engages in deviate sexual conduct;
(3) Appears in a state of nudity; or
(4) Fondles the genitals of himself or another person;
commits public indecency, a class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

ises. Approximately eleven individuals have been arrested at the Bookstore for violations of Indiana Code §35-45-4-1(a)(3) (appearing in a state of nudity). Plaintiffs Gayle Ann Marie Sutro and Carla Johnson are both performers scheduled to dance nude at the Bookstore. These performances have been discontinued for fear of prosecution.

Defendants raise only one argument on appeal. They claim that the district court erred in ruling that Indiana's public indecency statute is constitutionally infirm as overbroad. Defendants argue that the Indiana Supreme Court adequately narrowed the statute through judicial construction. We agree with defendants and therefore reverse the permanent injunction order and remand for consideration whether the First Amendment permits plaintiffs' activities.

Discussion

Our analysis begins with *State v. Baysinger*, 397 N.E.2d 580 (Ind. 1979), appeals dismissed *sub nom. Clark v. State*, 446 U.S. 931, and *Dove v. State*, 449 U.S. 806, which upheld the constitutionality of Indiana Code §35-45-4-1. Defendants first claim that the summary dismissals by the Supreme Court are binding precedent. Plaintiffs counter that the later Supreme Court decision of *Schad v. Mt. Ephraim*, 452 U.S. 61, reflects a subsequent change in the law under which we should review the *Baysinger* decision.

In *Hicks v. Miranda*, 422 U.S. 332, 343-345, the Supreme Court held that a dismissal "for want of a substantial federal question" is a decision on the merits. Lower courts are bound until subsequent Supreme Court decisions indicate otherwise. *Id.; Muench v. Israel*, 715 F.2d 1124, 1139 (7th Cir. 1983). Although it is clear that lower courts are bound by summary actions on the merits, "[a]scertaining the reach and content of summary actions may itself present issues of real substance." *Mandel v. Bradley*, 432 U.S. 173, 176 (quoting *Hicks*, 422 U.S. at 345 n. 14).

A dismissal for want of a substantial federal question is an affirmance of the judgment only, not the rationale of the opinion below. *Mandel*, 432 U.S. at 176. Such a summary dismissal rejects only the specific challenges presented in the statement of jurisdiction filed with the Supreme Court. Thus lower courts are prevented from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. *Id.* If the facts, issues, or law is different then there is reason not to follow the summary action. *Id.* at 180 ("In other words, after today, 'appropriate, but not necessarily conclusive, weight' is to be given this court's summary dispositions."). Thus if the jurisdictional statements in the *Baysinger* appeals raise the issue of overbreadth and it was necessarily decided, we must follow the Supreme Court's affirmance.

The *Baysinger* decision comprised three consolidated appeals from Indiana trial courts overturning the public nudity statute. The Indiana Supreme Court reached two issues in its opinion: (1) whether the term "public place" was vague and (2) whether the statute was overbroad. Because the case before us does not raise the vagueness argument, we need discuss only the overbreadth issue.

The *Baysinger* court held that nudity must be allowed when it is part of some larger form of expression that merits First Amendment protection. 397 N.E.2d at 587. So construed, it held that the statute was constitutional. The court went on to reject the argument that nude dancing is protected by the First Amendment, reasoning that the activity was simply conduct. *Id.*

Two of the consolidated cases were appealed separately to the Supreme Court of the United States. Both cases were summarily dismissed for want of a substantial federal question. *Clark v. State*, 446 U.S. 931, and *Dove v. State*, 449 U.S. 806. The jurisdictional statements in each case are as follows:

Clark v. State

1. Is that portion of the Indiana Code, Section

35-45-4-1, specifically (a)(3), which prohibits a female from appearing nude "in a public place" in conflict with the free speech clause of the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment for the reason that the statute is overbroad on its face?

2. Does the Appellant Sue Clark have the necessary standing to raise an overbreadth challenge to the constitutionality of Indiana Code 35-45-4-1(a)(3)?

Dove v. State

1. Is *Indiana Code*, Section 35-45-4-1(a)(3), which prohibits a female from appearing nude "in a public place" in conflict with the First Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment for the reason that the statute is overbroad on its face?

2. Is *Indiana Code*, Section 35-45-4-1(a)(3) & (b) in conflict with the First and Fourteenth Amendments of the Constitution of the United States in that said statute is vague?

3. Do the Appellants have the necessary standing to raise an overbreadth challenge to the constitutionality of *Indiana Code* 35-45-4-1(a)(3) and (b)?

Both statements of jurisdiction raise the issue of overbreadth. Thus the Supreme Court's summary dismissal is a ruling that the Indiana statute, as interpreted in *Baysinger*, is constitutional in the face of an overbreadth attack.[2] And as

[2] It is not always an easy task to figure out exactly what issues were declared by the Supreme Court to be without substance. However, by examining the law as it existed in 1980, we conclude that the overbreadth issue was necessarily decided by the Supreme Court despite additional standing arguments in the motions to dismiss. The Indiana Supreme Court in *Baysinger* questioned the defendants' standing to argue the First Amendment issue because they made money for dancing or appearing nude. 397 N.E.2d at 587. Countless First Amendment cases have involved persons who engaged in activities for monetary gain. See *Ginzburg v. United States*, 383 U.S. 463. In fact, most cases relating to the showing of

(footnote continued on following page)

construed by the Indiana Supreme Court the statute prohibits all nudity in public places unless coupled with other expressive activity protected by the First Amendment.

But plaintiffs argue that *Schad v. Mt. Ephraim*, 452 U.S. 61, decided after the *Baysinger* appeals were dismissed, has changed the applicable law. In *Schad* the Supreme Court invalidated a zoning ordinance that prohibited all live entertainment. The defendants in *Schad* operated an adult bookstore that offered to its customers the opportunity to view a live nude dancer and were convicted of violating the zoning ordinance. The Court held that the ordinance, by restricting all forms of live entertainment, was overbroad and violated the First and Fourteenth Amendments. *Id.* at 65-67. In so holding, the Court noted that "[e]ntertainment as well as political and ideological speech is protected by the First Amendment." *Id.* at 65. The Court then discussed the implications of nudity in entertainment and stated: "Nor may an entertainment program be prohibited solely because it displays the nude human figure. . . . Furthermore, as the state courts in this case recognized, nude dancing is not without its First Amendment protections from official regulations." *Id.* at 66 (citing *Doran v. Salem Inn, Inc.*, 422 U.S. 922; *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546; *California v. LaRue*, 409 U.S. 109).

Although the *Schad* Court did not decide the extent and scope of protections to be afforded nude dancing, see *New York St. Liquor Authority v. Bellanca*, 452 U.S. 714, 719 (Stevens, J., dissenting), it clearly held that the activity had roots in the First Amendment. 452 U.S. at 66. Therefore, the language of the opinion certainly calls into question the Indiana Supreme Court's holding in *Baysinger* that nude dancing was merely

[2] *continued*
films or live entertainment in the First Amendment context were brought by individuals seeking to make a profit. *E.g., Schad*, 452 U.S. 61; *Jenkins v. Georgia*, 418 U.S. 153; *Brockett v. Spokane Arcades*, 105 S. Ct. 2794; *Doran v. Salem Inn, Inc.*, 422 U.S. 922. By deductive reasoning, we conclude that the Supreme Court must have decided that both the vagueness and overbreadth issues were without substance.

conduct and as such was not entitled to First Amendment protection. However, *Schad* does not disturb the *Baysinger* overbreadth holding. *Schad* is consistent with *Baysinger's* decision that nudity needs to be combined with some sort of expressive activity before it falls within First Amendment protection. "[N]udity alone does not place otherwise protected material outside the mantle of the First Amendment." 452 U.S. at 66 (quoting *Jenkins v. Georgia*, 418 U.S. 153, 161). Because *Schad* leaves *Baysinger's* "nudity plus" formulation intact, its overbreadth holding as affirmed by the Supreme Court is still binding precedent. Thus under *Hicks* we are compelled to reverse the district court's departure from Supreme Court authority.

Plaintiffs raised an additional claim in district court *viz:* the application of the statute to prevent this type of nude entertainment is unconstitutional. The district court did not rule on plaintiffs' claim that Indiana's public indecency statute is unconstitutional in its application. Memorandum Opinion at 14 n.2. Neither of the jurisdictional statements in the *Baysinger* appeals to the Supreme Court of the United States raised an issue of the application of the otherwise valid statute to nude dancing. Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment and outside the reach of the public nudity statute as construed by *Baysinger.* Whether and to what extent the particular dancing activity of the plaintiffs is protected is still an open question. *Bellanca*, 452 U.S. at 719 (Stevens, J., dissenting); *Krueger v. Pensacola*, 759 F.2d 851, 854 n.4 (11th Cir. 1985). Several circuits have begun to reach issues involving statutes that restrict nude and semi-nude "bar-room" dancing and other forms of nude entertainment.

For example, the Eleventh Circuit recently addressed the constitutionality of an ordinance limiting nude dancing. *International Food & Beverage Systems v. Fort Lauderdale*, No. 85-5728, slip op. at 4545 (July 25, 1986). Citing *Schad*, the court

stated, "[w]e may take it for granted that nude dancing is constitutionally protected expression, at least if performed indoors before pay customers and not . . . before casual viewers." Slip op. at 4549. Earlier in *Krueger v. Pensacola*, 759 F.2d 851, 854 (1985), the Eleventh Circuit had recognized that topless dancing was a form of expression protected by the First Amendment. The *Krueger* court noted that the Supreme Court has consistently evaluated any potential artistic or communicative activity (including topless dancing) under First Amendment standards. *Id.* at 854 & n.4 (citing *Schad*, 422 U.S. at 66; *Southeastern Promotions*, 420 U.S. at 557-558); see also *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986) (allowing extensive time, place, and manner regulation of topless entertainment): *Avalon Cinema Corp. v. Thompson*, 658 F.2d 555 (8th Cir. 1981): *Williams v. Kleppe*, 539 F.2d 803 (1st Cir. 1976); *Chapin v. Southampton*, 457 F. Supp. 1170, 1174 (E.D.N.Y. 1978). The district court should examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection. See *Erznoznik v. Jacksonville*, 422 U.S. 205, 211 n.7, *Schad*, 452 U.S. at 66.

Conclusion

For these reasons we reverse the permanent injunction and remand the case for further proceedings not inconsistent with this opinion.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation, GAYLE ANN MARIE SUTRO, and CARLA JOHNSON,

Plaintiffs,

vs. Cause No. S85-353

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants.

ORDER

Upon motion of plaintiffs Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson and the court being duly advised in the premises, now finds that a permanent injunction should be issued in this case. Accordingly, it is hereby ORDERED, ADJUDGED and DECREED that all defendants in this case are hereby permanently enjoined from enforcing I.C. §35-45-4-1(a)(3), by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the facility commonly known as the Chippewa Bookstore, 500 West Chippewa Avenue, South Bend, Indiana, as performed by plaintiff Gayle Ann Marie Sutro or plaintiff Carla Johnson. SO ORDERED.

/s/ Allen Sharp
CHIEF JUDGE, UNITED STATES DISTRICT COURT

Enter: October 10, 1985

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation, GAYLE ANN MARIE SUTRO, and CARLA JOHNSON,

Plaintiffs,

vs. Cause No. S85-353

CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, Chief of Police of the South Bend Police Department; MICHAEL P. BARNES, Prosecutor of the County of St. Joseph, Indiana; and LINLEY PEARSON, Attorney General of the State of Indiana,

Defendants.

MEMORANDUM AND ORDER

[July 26, 1985]

This case challenges the constitutionality of Indiana's public indecency statute, I.C. §35-45-4-1. In their complaint, the plaintiffs seek preliminary and permanent injunctive relief restraining the defendants and their agents, servants and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. §35-45-4-1 in the factual context of this case. They are also seeking a declaratory judgment declaring I.C. §35-45-4-1 to be facially unconstitutional or in the alternative, that the application and threatened application of the statute to plaintiffs' proposed nude or semi-nude appearance at the Chippewa Bookstore is unconstitutional. The plaintiffs filed a Motion for Preliminary Injunction with a supporting brief. A hearing on the preliminary injunction was

held on July 1, 1985. All parties were given an opportunity to brief the issues and submit appropriate affidavits, which they have done. This memorandum and order constitutes the findings of fact and conclusions of law thereon as required by Rule 52 of the Federal Rules of Civil Procedure.

I.
FINDINGS OF FACT

Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Its primary business is supplying so-called adult entertainment through written and printed materials, movie showings and live entertainment at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana called the Chippewa Bookstore. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showings of the female body through glass panels. The customers would sit in a booth and insert coins in a timing mechanism that permitted them to observe the live nude and semi-nude dancers for a period of time. This live entertainment is offered to fee-paying consenting adults over the age of 18 and no accidental viewing by any non-consenting person of the live nude and semi-nude entertainment is possible. No alcoholic beverages are sold, consumed or allowed on the Chippewa Bookstore premises. Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

In a period of about two years from March 1983 to March 1985, there were approximately eleven arrests of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1(a) for appearing in a state of nudity. All those who have been arrested have been prosecuted and at least five of those persons have been convicted of violating the Indiana public indecency statute and have unsuccessfully appealed their conviction to the Indiana Court of Appeals and Indiana Supreme Court. The latest arrests occurred on March 27, 1985 at which time two females were arrested by the South Bend Police Department

and charged by the prosecuting attorney with violating I.C. §35-45-4-1. None of the plaintiffs in this case are the subject of criminal charges pertaining to the issues in this case.

As a result of the raids of March 27, 1985, the Chippewa Bookstore has discontinued the showing of any live nude entertainment. Glen Theatre, Inc. had scheduled Gayle Ann Marie Sutro (Sutro) to perform a nude dance production throughout the summer and fall of 1985 in conjunction with a South Bend area showing of one of her motion picture films at the Chippewa Drive-In. Sutro is a professional actress, stunt woman and ecdysiast and has studied acting, dancing, speech and language. She has danced, modeled and acted professionally for more than fifteen years and is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild and AFTRA. In her affidavit, Sutra stated that her nude dances are appropriately choreographed and are an attempt to communicate as well as to entertain.

Timothy J. Corbett, a sergeant with the South Bend Police Department and stationed in the South Sector of South Bend where all arrests at Chippewa Bookstore have occurred, stated in his affidavit that no arrests have ever been made for nudity as part of a play or ballet.

II.
CONCLUSIONS OF LAW

A. JURISDICTION, STANDING AND ABSTENTION

This court has jurisdiction over the parties and the subject matter of this action under 28 U.S.C. §1343(a)(3) and venue is proper under 28 U.S.C. §1391(b). The plaintiffs have standing to challenge the constitutionality of the Indiana public indecency statute. *See Flast v. Cohen*, 392 U.S. 83 (1968). They do not need to expose themselves to actual prosecution to present a justiciable controversy — the fear of prosecution, if reasonable is sufficient. *See Steffel v. Thompson*, 415 U.S. 452 (1974) and *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). The number

of arrests and prosecutions, including those resulting from the raid on March 17, 1985, of individuals at the Chippewa Bookstore for violations of I.C. §35-45-4-1 is a sufficient basis for a reasonable fear of prosecution to confer standing. Further, there are no grounds for this court to abstain from considering this case. None of the plaintiffs in this action are the subject of pending criminal prosecutions so abstention is not appropriate under the abstention theory described in *Younger v. Harris*, 401 U.S. 37 (1971). *See Doran v. Salem Inn., Inc.*, 422 U.S. 922 (1975). Nor do the facts of this case require abstention under the abstention theories described in *Railroad Commission v. Pullman Co.*, 312 U.S. 496 (1941) or *Colorado River Conservation District v. United States*, 424 U.S. 800 (1976). Accordingly, this court must proceed to determine the merits of plaintiffs' request for preliminary injunctive relief.

B. PRELIMINARY INJUNCTION

The issuance of a preliminary injunction is an extraordinary remedy and involves the exercise of a far reaching power. Therefore, it should not be used except in a case clearly warranting it and will not be available unless the plaintiffs carry their burden of persuasion as to all the prerequisites. *See., e.g., Godinez v. Lane*, 733 F. 2d 1250, 1257 (7th Cir. 1984); *Shaffer v. Globe Protection, Inc.*, 721 F. 2d 1121, 1123 (7th Cir. 1983). To be entitled to preliminary injunctive relief, the plaintiffs must establish that (1) they have no adequate remedy at law or will be irreparably harmed if the preliminary injunction does not issue; (2) the threatened injury to the plaintiffs outweighs the threatened harm the preliminary injunction may inflict upon the defendants; (3) the plaintiffs have a reasonable likelihood of success on the merits; and (4) the granting of the preliminary injunction will not disserve the public interest. *See, e.g., Palmer v. City of Chicago*, 755 F. 2d 560, 576 (7th Cir. 1985); *Roland Machine Co. v. Dresser Industries, Inc.*, 49 F.2d 380, 383 (7th Cir. 1984); *Technical Publishing Co. v. Lebhar-Friedman, Inc.*, 729 F. 2d 1136, 1138-39 (7th Cir. 1984). In considering each of these four factors, the court must weigh carefully the

interests of both sides. *Palmer v. City of Chicago*, 755 F. 2d at 577; *see Doran v. Salem Inn Inc.*, 422 U.S. 922, 931 (1975).

1. Likelihood of Success on Merits

The Indiana public indecency statute provides in pertinent part as follows:

> (a) A person who knowingly or intentionally, in a public place:
>
> * * *
>
> (3) appears in a state of nudity;
>
> * * *
>
> commits public indecency, a Class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.
>
> * * *

I.C. §35-45-4-1.[1] The plaintiffs in this case allege that this statute is unconstitutional on its face because it is overbroad and infringes upon their rights and the rights of others under the First Amendment of the Constitution of the United

[1] The plaintiffs in this case are challenging the constitutionality of I.C. §35-45-4-1 in its entirety. Counsel for plaintiffs admitted at the hearing on the preliminary injunction that the conduct described in subsections (a)(1) and (2) were not involved in this case and that he was uncertain with respect to the conduct described in subsection (a)(4). There is no reference in this case to subsection (c) of the statute. Accordingly, the main thrust of plaintiffs' challenge is aimed at I.C. §35-45-4-1(a)(3) and the court will focus on that subsection for purposes of the preliminary injunction. At such time as the court is required to rule on the merits of this case, its opinion will comport with the applicable law on the issue of invalidation and severability. *See Brockett v. Spokane Arcades, Inc.*, 53 U.S.L.W. 4793 (S. Ct. June 18, 1985).

States.[2] The defendants maintain that the statute is facially directed only to conduct not expression, and has been limited by Indiana's court to exclude application to protected expression and can therefore withstand a constitutional attack.

A demonstrably overbroad statute may deter the legitimate exercise of First Amendment rights and when a plaintiff's claim is rooted in those rights, he is entitled to rely upon the impact of the statute on the expressive activities of others as well as his own in challenging a statute on overbreadth grounds. *see, e.g., Schad v. Mount Ephram*, 452 U.S. 61, 66 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 114 (1972). However, a court must proceed with caution and restraint when considering a facial challenge to a statute so as to not unnecessarily interfere with a state's laws. In accommodating these competing interests, a court should not deem a state statute facially invalid unless it is not readily subject to a narrowing construction by the state courts and its deterrent effect on legitimate expression is both real and substantial. *Ergnoznik v. City of Jacksonville*, 422 U.S. at 216; *see Dombroski v. Pfister*, 380 U.S. 479, 471 (1965); *Broadrick v. Oklahoma*, 413 U.S. 601, 612-15 (1975); *Coates v. Cincinnati*, 402 U.S. 611 (1972).

The plain language of Indiana's public indecency statute clearly indicates its applicability to all nude appearances in a public place, at any time, in any manner, for any purpose. It is not limited to nude dancing, the activity in question in this case, nor is it limited by or in any way connected to obscene nudity.[3] Rather, it imposes sanctions on all individuals who appear nude in any public place without any limitations.

---

[2] The plaintiffs also allege that the application of the statute to their conduct is unconstitutional. Since this court finds a likelihood of success on plaintiffs' claim of facial unconstitutionality, it will not address this claim for purposes of the preliminary injunction.

[3] This case is only addressed to non-obscene nude and semi-nude dancing. No issue has been raised with respect to obscenity and I.C. §35-30-10.101 et seq.

Nudity alone does not place otherwise protected material outside the guarantee of the First Amendment. *Schad v. Mount Ephram*, 452 U.S. 61, 66 (1981); *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211-13 (1975). Thus, an entertainment program may not be prohibited solely because it displays the nude human figure. "Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, and live entertainment, such as musical and dramatic works, fall within the First Amendment guarantee." *Schad v. Mount Ephram*, 452 U.S. at 65; *see Joseph Burstyn v. Wilson*, 343 U.S. 495 (1952); *Schat v. United States*, 398 U.S. 58 (1970); *Jenkins v. Georgia, supra; Southeastern Promotions, Ltd. v. Conrad, supra; Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). Furthermore, nude dancing is not without its first Amendment protections from official regulation. *Doran v. Salem Inn, Inc., supra; Southeastern Promotions, Ltd. v. Conrad, supra; California v. LaRue*, 409 U.S. 109 (1972).

The broad language of I.C. §35-45-4-1 clearly may have a real and substantial determent effect on legitimate expression. By its terms, it empowers law enforcement officials to arrest and prosecute a nude woman dancer or actress in a professional stage production, a model posing nude for art classes at a university, or a nude woman engaged in a public meeting the purpose of which is to educate and encourage infant breast feeding or self-examination for breast cancer. These activities are afforded the broadest First Amendment protection but may be made illegal under this statute. Likewise, the statute is not readily subject to a narrowing construction by the state courts in a proper exercise of their judicial power. In *State v. Baysinger*, ____ Ind. ____ 397 N.E. 2d 580 (1980), the Indiana Supreme Court addressed the constitutionality of I.C. §35-45-4-1 and found it constitutional. In its opinion, the court stated:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is in the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ides is involved.

397 N.E. 2d at 587. This language indicates that the Indiana Supreme Court recognizes that public nudity, at least in some circumstances, is constitutionally protected. The opinion appears to limit that protection to instances when the communication of ideas is involved in a larger form of expression but does not identify, describe or articulate what such activity encompasses. Rather, it merely found that appearing nude or dancing in the nude in bars was conduct and not entitled to protection. The opinion of the Supreme Court of the United States in *Schad v. Mount Ephram*, decided subsequently to *State v. Baysinger*, indicates that entertainment, including, non-obscene nude dancing, is entitled to some First Amendment protection. Further, the opinions of the Indiana courts subsequent to *State v. Baysinger* have not narrowed the construction of I.C. §35-45-4-1. *See Erhardt v. State*, ____ Ind. ____, 468 N.E. 2d 224 (1984); *Adams v. State*, ____ Ind. App. ____, 461 N.E. 2d 740 (1984). Accordingly, this court finds that plaintiffs have shown that they have a reasonable likelihood of success on the merits of their claim that I.C. §35-45-4-1(a)(3) is unconstitutional.

2. **Irreparable Harm/Adequate Remedy at Law**

The second factor plaintiffs must establish to be entitled to injunctive relief is that they have no adequate remedy at law or will be irreparably harmed if the injunction does not issue. The Supreme Court of the United States has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm." *Elrod v. Burns*, 427 U.S. 347, 374 (1976). Further, the chilling effect on a plaintiff's First Amendment rights from the threat of sanctions even without the actual imposition of sanctions raises a presumption of deprivation of First Amendment rights which fulfills the required showing of irreparable harm. *O'Brien v. Town of Caledonia*, 748 F. 2d 403, 409 (7th Cir. 1984); *Schnell v. Chicago*, 407 F. 2d 1084, 1086 (7th Cir. 1969); *see N.A.A.C.P. v. Button*, 371 U.S. 415, 433 (1963); *Citizens for A Better Environment v. City of Park Ridge*, 567 F. 2d 689, 691 (7th Cir. 1975).

In this case, the threat of arrest and prosecution for violating I.C. §35-45-4-1 may have had a chilling effect on plaintiffs' First Amendment rights. Live nude dancing has ceased at the Chippewa Bookstore, including the scheduled performance of Gayle Ann Marie Sutro, because of the fear of prosecution. Accordingly, the plaintiffs have shown irreparable harm.

3. **Balance of Harm**

The third factor, balance of harm, requires consideration of the defendants' interest in enforcing the statute. The legislative intent in prohibiting public indecency is to protect a non-consenting viewer from being exposed to a spectacle he or she may find repugant. *See Lasko v. State*, ____ Ind. App. ____, 409 N.E. 2d 1124, 1128 (1980). In the factual context of this case, the possibility of a non-consenting individual observing the nude dancing at Chippewa Bookstore is extremely remote. The nude dancing takes place in a fully enclosed opaque building and can be observed only by entering the mini-booths, and depositing money in a timing mechanism. The legislative intent would therefore not be undermined nor ignored by an injunction restraining arrest and prosecution of individuals under I.C. §35-45-4-1(a)(3) in the factual context of this case. Further, in light of the probable unconstitutional overbreadth of I.C. §35-45-4-1(a)(3), it would not greatly harm the defendants to be restrained from enforcing that specific provision in the factual context of this case. On the other hand, the chilling of plaintiffs' First Amendment rights is causing irreparable harm. The balance of harm favors the plaintiffs.

4. Public Interest

In the context of a First Amendment case, some consideration of this factor is implicit in addressing the likelihood of success on the merit. The public has a strong interest in the vindication of an individual's constitutional rights. Furthermore, as indicated in the preceding section of this opinion, the intent of the legislature in enacting the public indecency statute would not be undermined by enjoining the defendants from enforcing I.C. §35-45-4-1(a)(3) in the limited factual context of this case. Accordingly, the plaintiffs have made requisite showing of this factor.

III.
ORDER

For the foregoing reasons, plaintiffs' Motion for a Preliminary Injunction is GRANTED. The defendants are hereby enjoined until further order of this court from enforcing I.C. §35-45-4-1(a)(3), by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the Chippewa Bookstore as performed by plaintiff Gayle Ann Marie Sutro or plaintiff Carla Johnson. SO ORDERED.

Enter July 26, 1985.

/s/ Allen Sharp
CHIEF JUDGE, UNITED
STATES DISTRICT
COURT

Supreme Court, U.S.
FILED
JUL 27 1990
ROBERT F. SPANIOL, JR.
CLERK

No. 90-26 (3)

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRADLEY J. SHAFER*
LEE J. KLEIN
KLEIN & SHAFER, P.C.
4121 Okemos Rd.
Suite 20
Okemos, MI 48864
(517) 349-8666
Attorneys for Respondents, Glen Theatre, Inc., Carla Johnson, and Gayle Ann Marie Sutro

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether nude dancing as entertainment, performed indoors and before a willing audience, is expression entitled to First Amendment protection.

2. These Respondents rely upon the second question presented in the Petition for a Writ of Certiorari.

LIST OF PARTIES

These Respondents rely upon the list of parties as set forth in the Petition for a Writ of Certiorari.

Respondent Glen Theatre, Inc. has no parent or subsidiary companies to be listed.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

LIST OF AUTHORITIES iv

OPINIONS BELOW 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT:

I. THE ISSUE OF WHETHER NUDE DANCING, AS ENTERTAINMENT, IS A CONSTITUTIONALLY PROTECTED FORM OF EXPRESSION IS AN ISSUE THAT HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT, AND THE DECISION OF THE SEVENTH CIRCUIT BELOW DIRECTLY FOLLOWS THE PRECEDENT SET BY THIS COURT AND IS IN CONFORMITY WITH THE MAJORITY OF LOWER COURTS THAT HAVE ADDRESSED THIS ISSUE 3

A. THE ISSUE OF WHETHER NUDE DANCING IS "EXPRESSION," AND, THEREFORE, ENTITLED TO FIRST AMENDMENT PROTECTION, HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT. 3

B. THE SEVENTH CIRCUIT'S HOLDING IS NEITHER NOVEL NOR DOES IT "POTENTIALLY INVALIDATE" INDECENCY OR NUDITY STATUTES IN MANY STATES. ... 6

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT 13

CONCLUSION 25

APPENDIX ..... App. 1

TABLE OF AUTHORITIES

Pages

CASES

Attwood v. Purcell, 402 F. Supp. 231 (D. Az. 1975) ..7, 12

BSA Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986).....7, 10

Cabaret Enterprises, Inc. v. Alcoholic Beverages Con. Comm., 393 Mass 13, 468 N.E.2d 612 (1984) 11

California v. LaRue, 409 U.S. 109 (1972) .. 3, 4, 7, 18, 19, 22

City of Chicago v. Hanson, 105 Ill. App. 3d 1017, 435 N.E.2d 120 (1982)..... 12

City of Newport, Kentucky v. Iacobucci, 479 U.S. 92 (1986) 4, 5, 19

City of Portland v. Derrington, 253 Or. 289, 451 P.2d 111 (1969), *cert. denied*, 396 U.S. 901 (1969) 15, 16, 17, 18

City of Portland v. Gatewood, 76 Or. App. 74, 708 P.2d 615 (1985), *re. denied*, 700 Or. 477, 713 P.2d 1058 (1986).....16, 17

City of Revere v. Aucella, 369 Mass. 138, 338 N.E.2d 816 (1975)..... 12

Commonwealth v. Sees, 374 Mass. 532, 373 N.E.2d 1151 (1978)..... 11

Crownover v. Musick, 107 Cal. Rptr. 681, 509 P.2d 497 (1973)..... 11

Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988), aff'd. 898 F.2d 612 (8th Cir. 1990) ..7, 11

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)..... *passim*

TABLE OF AUTHORITIES – Continued

Pages

Duvallon v. State, 404 So.2d 196 (1st DCA 1981) 18

Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).....14, 15

FW/PBS v. City of Dallas, 493 U.S. ___, 107 L.Ed.2d 603 (1990).....5, 7

Function Junction, Inc. v. City of Daytona Beach, 705 F.Supp. 544 (M.D. Fla. 1988)..... 18

Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980).....21, 22

Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986)..... 8

Goodmakers v. State, 450 So.2d 888 (2d DCA 1984) 18

Grand Faloon Tavern Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982), *cert. denied*, 459 U.S. 859 (1982) 18

Hoffman v. Carson, 250 So.2d 891 (Fla. 1971), *appeal dismissed for want of substantial federal question* 404 U.S. 981 (1971).....17, 18

In Re Giannini, 72 Cal. Rptr. 655, 446 P.2d 535 (1968) 11

International Food & Beverage System v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986).....7, 10, 18

Jamaica Inn, Inc. v. Daley, 52 Ill. App. 3d 257, 368 N.E.2d 589 (1977) *rev'd on other grounds*, 72 Ill. 2d 415, 381 N.E.2d 694 (1978) 12

Kev Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986).....7, 10

TABLE OF AUTHORITIES – Continued

Pages

Koppinger v. City of Fairmont, 311 Minn. 186, 248 N.W.2d 708 (Minn. 1976) 11, 12

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) 7, 10, 18

Little v. City of Greenfield, 575 F.Supp. 656 (E.D. Wis. 1983) 13

Major Liquors, Inc. v. City of Omaha, 188 Neb. 628, 198 N.W.2d 483 (1972) 18, 19, 20, 21

Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982) 7

Miller v. California, 413 U.S. 15 (1973) 12

Moody v. Board County Commissioners, 237 Kan. 67, 697 P.2d 1310 (1985) 10

Morris v. Municipal Court, 186 Cal. Rptr. 494, 652 P.2d 51 (1982) 11

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 4, 19

People v. Better, 33 Ill. App. 3d 58, 337 N.E.2d 272 (1975) 13

People v. Garrison, 82 Ill. 2d 444, 412 N.E.2d 483 (1980) 12

People v. Wilson, 95 Mich. App. 440, 291 N.W.2d 73 (1980) 23, 24, 25

Piarowski v. Illinois Community College District 515, 759 F.2d 625 (7th Cir. 1985) 7

TABLE OF AUTHORITIES – Continued

Pages

Reichenberger v. Warren, 319 F.Supp. 1237 (W.D. Wis. 1970) 13

Robinson v. State, 253 Ark 882, 489 S.W.2d 503 (1973) 20

Sable Communications v. FCC, 492 U.S. ___, 106 L. Ed.2d 93 (1989) 6

Salem Inn, Inc. v. Frank, 501 F.2d 18 (2nd Cir. 1974), aff'd 422 U.S. 922 (1975) 7, 10, 12

Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981) 4, 5, 7, 14, 18, 20, 21

Sekne v. City of Portland, 81 Or. App. 630, 726 P.2d 959 (1986) 16, 17

State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979) *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980) 14, 21

State v. Brooks, 275 Or. 171, 550 P.2d 440 (1976) 11, 16, 17

State v. Jacobson, 459 So.2d 1285 (La. App. 1984), *writ denied*, 463 So.2d 599 (La. 1985) 22

State v. Walters, 440 So.2d 115 (La. 1983) 22, 23

Walker v. City of Kansas, Mo., 691 F. Supp. 1243 (W.D. Mo. 1988) 7

Winters v. New York, 338 U.S. 507 (1947) 3

Young v. Arkansas, 286 Ark. 413, 692 S.W.2d 752 (1985) *cert. denied*, 474 U.S. 1070 (1986) 20, 21, 23

Zacchini v. Scripps-Howard Broadcasting Company, 433 U.S. 562 (1977) 3

TABLE OF AUTHORITIES – Continued

Pages

CONSTITUTIONAL PROVISIONS

First Amendment ..... *passim*

Twenty-first Amendment 19, 22

STATE STATUTES

Ark.Stat.Ann. Section 5-14-112 ..... 10, 20

Ark.Stat.Ann. Section 41-1812 20

Cal. Penal Code Section 314 (West.) 10, 11

Colo. Rev. Stat. Section 18-7-301 10

Conn. Gen. Stat. Ann. Section 53a-186 10

Fla. Stat. Ann. Section 800.03 (West.) 11

Ga. Code Ann. Section 16-6-8 (1981) 10

Ill. Ann. Stat. Ch. 38, Section 11-9 11

Ind. Code Section 35-45-4-1 ..... *passim*

Kan. Stat. Ann. Section 21-3508 (Supp. 1990) 10

La. Rev. Stat. Ann. Section 14:106A(1) 10, 23

Mass. Gen. L. Ann. Ch. 272, Section 53 11

Mich. Comp. Laws Ann. Section 750.335a 24

Minn. Stat. Ann. Section 617.23 11

Nev. Rev. Stat. Section 201.220 10

Or. Rev. Stat. Section 163.465 (sic) 10, 11, 16

Va. Code Ann. Section 18.2-387 10

Vt. Stat. Ann. Tit. 13, Section 2601 (Supp. 1989) 10

TABLE OF AUTHORITIES – Continued

Pages

Wisc. Stat. Section 944.20 11

Wyo. Stat. Section 6-4-201(a) 10

COURT RULES

Sup. Ct. R. 10.1(a) 13

Sup. Ct. R. 15.1 14

OTHER AUTHORITIES

Erhardt v. State: Nude Dancing Stripped of First Amendment Protection, 19 Ind.L.Rev. 1, 8 (1986) 5

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Respondents, Glen Theatre, Inc., Carla Johnson, and Gayle Ann Marie Sutro respectfully request this Court to deny the Petition for a Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Seventh Circuit, sitting en banc, entered in *Darlene Miller, et al. v. Civil City of South Bend, et al.*, Nos. 88-3006 & 88-3244, on May 24, 1990.

OPINIONS BELOW

These Respondents rely upon Petitioners' recitation of the opinions below, but add the judgment of the Seventh Circuit entered on May 24, 1990, as of yet unreported, which is reprinted as Appendix 1 herein.

STATEMENT OF THE CASE

These Respondents rely upon the Statement of the Case in the Petition for a Writ of Certiorari, with the exceptions as noted below.

The videotape of nude dancing that was submitted to the District Court below (referred to in Petition, pgs. 4 & 6), was submitted by the Plaintiffs in the matter of *Darlene Miller et al. v. Civil City of South Bend, Indiana et al.*, No. 88-3006, and was neither submitted nor relied upon by these Respondents in their action, *Glen Theatre, Inc. v. Civil City of South Bend, Indiana et al.*, No. 88-3244. To the extent that either the district court or the circuit court of appeals indicated that these Respondents relied upon that videotape, such conclusion is in error. These Respondents, rather, relied upon the affidavit of Gayle Ann Marie Sutro (referred to in Petition, p. 4), attached as Appendix 2.

In addition, the reference at page 6 of the Petition is in error when it indicates that the Seventh Circuit, in its second decision on these matters, "ignored" the finding the District Court was instructed to make on remand. Rather, the Seventh Circuit, in its second decision in these matters, held that an unintended ambiguity existed in its first decision, which had confused the district court in its

duty and role upon remand. *Miller v. Civil City of South Bend*, 887 F.2d 826 (1989) (Petitioners' Appx. 117-119).

REASONS FOR DENYING THE WRIT

I. THE ISSUE OF WHETHER NUDE DANCING AS ENTERTAINMENT, IS A CONSTITUTIONALLY PROTECTED FORM OF EXPRESSION IS AN ISSUE THAT HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT, AND THE DECISION OF THE SEVENTH CIRCUIT BELOW DIRECTLY FOLLOWS THE PRECEDENT SET BY THIS COURT AND IS IN CONFORMITY WITH THE MAJORITY OF LOWER COURTS THAT HAVE ADDRESSED THIS ISSUE.

A. THE ISSUE OF WHETHER NUDE DANCING IS "EXPRESSION," AND, THEREFORE, ENTITLED TO FIRST AMENDMENT PROTECTION, HAS PREVIOUSLY BEEN RESOLVED BY THIS COURT.

The simple issue below was whether nude dancing as entertainment, performed indoors and before a willing audience, was a form of expression warranting protection under the first amendment.

This Court has long and often held that entertainment enjoys first amendment protections. *Winters v. New York*, 338 U.S. 507, 510 (1947); *Zacchini v. Scripps-Howard Broadcasting Company*, 433 U.S. 562, 578 (1977). In addition, in a line of cases discussed in the State of Indiana's Petition for a Writ of Certiorari, this Court first implicitly, and then explicitly held that nude dancing as entertainment was not without first amendment protections. *See*, among others, *California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932-933 (1975); and

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65-66 (1981). The exclusive limitation recognized by this Court of the constitutional protection afforded nude dancing is found when such entertainment is combined with the sale of alcoholic beverages. This Court has unequivocally indicated that *in those circumstances*, nude dancing may be prohibited under the State's inherent power to regulate the sale of alcoholic beverages conferred by the Twenty-first Amendment to the United States Constitution, which *outweighs*, in such circumstances, the interest in free expression by nude dancing. *LaRue, supra*, at 118, *Doran, supra*, at 932-933, *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 716-718 (1981); *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92, 97 (1986).

If nude dancing, performed as entertainment before a willing audience was not "expression" warranting protection under the first amendment, this Court need not have resorted to the inherent powers of the twenty-first amendment in order to sustain the legislation at issue in *LaRue, Doran, Bellanca*, and *Iacobucci*. Rather than indicating that the powers of the twenty-first amendment (to regulate alcohol) *outweigh* the first amendment concerns of nude dancing, this Court could simply have concluded that this form of nude dance entertainment was devoid of Constitutional protection and, therefore permitted, *on that basis*, any form of regulation (or exclusion) of it.

As noted by one author:

> "The extensive treatment in *LaRue, Schad*, and *Bellanca* concerning the distinction between nude dancing occurring in an establishment which serves alcohol and in an establishment which does not would be *pointless* if nude entertainment were not entitled to a first amendment protection in either establishment." Been, *Erhardt v. State: Nude Dancing Stripped of First Amendment Protection*, 19 Ind.L.Rev. 1,8 (1986) (emphasis added).

The logical conclusion to be drawn by these decisions is that if not for the inherent powers under the twenty-first amendment, the legislation at issue in those holdings would violate first amendment protections. *Iacobucci*, at 99, Stevens J., dissenting.[1]

This Court's plurality opinion in *FW/PBS v. City of Dallas*, 493 U.S. ___, 107 L.Ed.2d 603 (1990), similarly indicates that nude dancing is a form of expression entitled to first amendment protections. In listing various prior decisions holding certain types of expression to be constitutionally protected, this Court cited *Schad, supra*, for the proposition that nude dancing is, indeed, such protected expression. *Id.*, at 617.[2]

---

[1] For this reason, Petitioners are in error that the legislation at issue can be considered to be a valid content-neutral time, place or manner regulation.

[2] The Petitioners are in error when they indicate that "[t]he reference to *Schad* merely points out the probable basis for the City's concession." Petition, at 10. When referring to *Schad* in *FW/PBS*, this Court was not enumerating the basis of the concession by the City of Dallas as to the constitutional protections of the various modes of expression at issue there, but was rather outlining previous holdings that *confirmed* that the enumerated forms of expression, indeed, warranted First Amendment protections.

In *Sable Communications v. FCC*, 492 U.S. ___, 106 L.Ed.2d 93 (1989), this Court further held that "sexual expression which is indecent but not obscene is protected by the First Amendment." *Id.*, 106 L.Ed.2d at 105. Given that the nude dancing here at issue was stipulated to be non-obscene, there is no other conclusion but that it was entitled to presumptive constitutional protection, and the statute at issue (Ind. Code Section 35-45-4-1), which totally prohibits non-obscene nudity under all circumstances, is unconstitutionally overbroad when applied to nude dancing as expression. The decisions of this Court can lead to no other conclusion.

B. THE SEVENTH CIRCUIT'S HOLDING IS NEITHER NOVEL NOR DOES IT "POTENTIALLY INVALIDATE" INDECENCY OR NUDITY STATUTES IN MANY STATES

Petitioners' basic position is that non-obscene nude dancing is not entitled to protection from criminal proscription under the First Amendment of the United States Constitution, as it is not imbued with sufficient communicative content to be considered protectable "speech" or "expression." The gravamen of Petitioners' argument therefore must be that *dance*, as entertainment, in and of itself, is not "expression" such as to warrant constitutional protection. This assertion must necessarily underlie the Petitioners' theory, given this Court's repeated pronouncements that "nudity alone does not place otherwise protected material outside the mantle of the first amendment". *Schad, supra*, at 66, and cases cited therein. In asserting this contention, Petitioners argue that the Seventh Circuit decision, affording constitutional protection

to non-obscene nude dance entertainment, performed indoors and before a willing audience, is a "novel holding." Petition, at 10. Petitioners are in error.

Not only does the decision of the Seventh Circuit below directly follow the holdings of this Court in *LaRue, Doran, Schad* and *FW/PBS, Inc.*, but this decision is in accord with the vast majority of state and lower federal court decisions decided subsequent to this Court's holding in *Schad*.[3] In fact, even prior to the immediate decision below, the Seventh Circuit had indicated that "entertainment that falls short of anyone's idea of 'art,'" including "topless dancing", is protected under the first amendment unless the "artistic expression is obscene in the legal sense." *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 628 (7th Cir. 1985).

Petitioners also overstate the effect and breadth of the decision below. First, Petitioners argue that the opinion is not limited to nude dancing "inside bars and 'bookstores' before consenting adults" but extends to "any person who appears nude in any public place, as long as

---

[3] *See*, for example, *International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985); *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986); *BSA Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986); *Walker v. City of Kansas, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988); *Doe v. City of Minneapolis*, 693 F.Supp. 774, 779 n. 12 (D. Minn. 1988), Aff'd. 898 F.2d 612 (8th Cir. 1990); *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n. 3 (2nd Cir. 1974), Aff'd 422 U.S. 922 (1975); *Attwood v. Purcell*, 402 F.Supp. 231, 233-236 (D. Az. 1975); *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska. 1982); and numerous cases cited, *infra*.

he or she is dancing." Petition, at 12. Petitioners ignore, however, the very language of the judgment and opinion of the Seventh Circuit below. The consideration and decision by the Seventh Circuit was of a very limited nature, that being whether the Indiana "public indecency" statute could be constitutionally applied against *these Respondents*, in *these circumstances* (i.e. dancing as entertainment, indoors, and before a willing audience). This was not a facial overbreadth challenge, as that constitutional issue had been resolved against Respondents in the first decision of the Seventh Circuit in this action. *Glen Theatre, Inc., v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Petitioners' Appx. 140-147).

Both the judgment below (Appx. 1, *infra*) and the En Banc opinion of the Seventh Circuit indicate that the State of Indiana is enjoined *only* from enforcing its public indecency statute "against these Plaintiffs," and applies neither to any other individuals nor other circumstances. In fact, Judge Flaum, author of the majority opinion, indicated that the Constitution does not preclude the legislature from imposing a ban of nude dancing "upon the public in settings such as streets, parks and beaches." (Petitioners' Appx. 15). Simply stated, the decision of the Seventh Circuit is limited in its holding to bar enforcement of the public indecency statute of Indiana against *these Respondents in these circumstances*; it has no other effect.

Nor, as suggested by the Petitioners, does this decision potentially invalidate "the indecent exposure or

public indecency statutes of 17 states",[4] let alone the Indiana statute at issue. As the basis of the Seventh Circuit decision was a constitutional challenge "as applied," neither the Indiana statute nor the statute of any other state has been *"invalidated"* by the Seventh Circuit's decision. Rather, the scope of a single statute has been limited so as to not impinge upon constitutionally protected expression.

Petitioners also overstate the precedential effect of this decision, even assuming, arguendo, that it goes beyond or expands upon the protections noted by this Court in its decisions. First, it is axiomatic that a decision of a United States Circuit Court of Appeals has precedential force only in the states that comprise that Circuit. Therefore, with the exception of the states of Wisconsin, Illinois and Indiana (those states comprising the Seventh Circuit), the remaining state, district and protectorate statutes (as cited to by the Petitioners in footnote 6 of their Petition) are not affected in any fashion whatsoever by the decision below. In fact, quite to the contrary, many of the statutes as cited by the Petitioners, if affected at all in their potential application to nude dancing as entertainment, are controlled, rather, (in addition to this Court's pronouncements) by decisions of *other* circuit courts of appeals that have similarly concluded that nude

---

[4] While Petitioners argue that this decision potentially invalidates indecent exposure or public indecency statutes of "17 states," in addition to the statute of Indiana, Petitioners then list, in footnote 6 of their Petition, the statutes of 23 states, in addition to those of the Virgin Islands and District of Columbia. The significance of this discrepancy, if there is one, is not readily apparent.

dancing as entertainment is a constitutionally protected form of expression.[5] In addition, many of the statutes cited by the Petitioners are dissimilar to the statute at issue and would not, therefore, be necessarily subject to the same constitutional construction[6], while other

---

[5] For example, the reach of Conn. Gen. Stat. Ann. Section 53a-186, and Vt. Stat. Ann. Tit. 13, Section 2601 (Supp. 1989) to prohibit nude dancing as entertainment, is controlled not by the Seventh Circuit's decision below, but rather by the Second Circuit's decision of *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21, n. 3 (2d Cir. 1974), aff'd, 422 U.S. 922 (1975).

Similarly, the Eleventh Circuit has, consistent with this Court's opinions, declared that nude dancing is constitutionally protected expression, at least if performed indoors before paying customers and not in a street or park before casual viewers. *International Food & Beverage Systems, supra*, at 1525; see also *Krueger, supra*, at 854. Therefore, Fla. Stat. Ann. Section 800.03 (West.) and Ga. Code Ann. Section 16-6-8 (1981) are limited, if at all, not by the Seventh Circuit decision at issue, but by the prior decisions of the Eleventh Circuit.

Other statutes cited by the Petitioners, including Cal. Penal Code Section 314 (West.), Nev. Rev. Stat. Section 201.220 and Or. Rev. Stat. Section 163.465 (sic) are controlled by similar holdings by the Ninth Circuit in *BSA Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) and *Kev Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986).

[6] *See*, for example, Ark. Stat. Ann. Section 5-14-112 [precluding only conduct over and above nudity – see discussion, *infra*]; Kan. Stat. Ann. Section 21-3508 (Supp. 1990), with the Kansas Supreme Court acknowledging in *Moody v. Board County Commissioners*, 237 Kan. 67, 697 P.2d 1310, 1316 (1985) that not only is nude dancing a means of expression entitled to First Amendment protections, but that the State statute requires, for proscription, not just nudity but the "intent to arouse or gratify the sexual desires of the offender or another"; Colo. Rev. Stat. Section 18-7-301 [a similar statute]; Wyo. Stat. Section 6-4-201(a) [same]; La. Rev. Stat. Ann. Section 14:106A(1) [precluding not mere nudity, but *obscene* conduct – see discussion, *infra*]; Va. Code Ann. Section 18.2-387 [precluding "*obscene* display or exposure of his person"].

statutes relied upon by Petitioners have been directly, or by implication, limited in their scope to preclude their application to the type of nude dancing at issue here.[7]

Furthermore, while the Seventh Circuit decision would potentially apply to the Illinois "public indecency" statute (Ill. Ann. Stat. Ch. 38, Section 11-9 (Smith Hurd)), and to the Wisconsin "lewd and lascivious behavior" statute (Wis. Stat. Section 944.20), the effect on those

---

[7] *See*, for example, Cal. Penal Code Section 314 (West), limited by *In Re Giannini*, 72 Cal. Rptr. 655, 446 P.2d 535 (1968), the seminal case holding that nude dancing as entertainment cannot be prohibited by an indecent exposure statute, and *Morris v. Municipal Court*, 186 Cal. Rptr. 494, 652 P.2d 51 (1982), coming to the same result and overruling an interim decision, *Crownover v. Musick*, 107 Cal. Rptr. 681, 509 P.2d 497 (1973), that had reached an opposite conclusion; Fla. Stat. Ann. Section 800.03 (West), limited by various holdings in that jurisdiction that nude dancing is constitutionally protected expression – see discussion, *infra*; Mass. Gen. L. Ann. Ch. 272, Section 53, limited by the Massachusetts Supreme Court decisions of *Cabaret Enterprises, Inc., v. Alcoholic Beverages Con. Comm.*, 393 Mass 13, 468 N.E.2d 612 (1984) and *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978), holding "barroom" type nude dancing to be constitutionally protected expression; Minn. Stat. Ann. Section 617.23, limited by the decisions of *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (Minn. 1976) [indicating that a city ordinance could not constitutionally ban nude dancing in places other than where alcoholic beverages were sold] and *Doe v. City of Minneapolis*, 693 F.Supp 774, 779 (D. Minn. 1988), aff'd 898 F.2d 612 (8th Cir. 1990), [holding that First Amendment protections attach to sexually explicit "live dance entertainment"]; Or. Rev. Stat. Section 163.465 (sic), limited by *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976) [holding this statute not to apply to nude dancing inside an entertainment establishment before a willing audience – see discussion, *infra*].

statutes by the decision below is meaningless, as those statutes have already been constitutionally limited in their scope.

In *People v. Garrison*, 82 Ill. 2d 444, 412 N.E.2d 483 (1980), the Supreme Court of Illinois, in limiting the reach of its statute to preclude application to activities which are primarily expressive, and, by direct example, to the type of nude dancing at issue here, noted:

> "The statute itself does not disclaim application to operas, ballets, plays or other performances within the protection of the first amendment. Since the statute does not contain obscenity standards acceptable under *Miller v. California*, 413 U.S. 15 (1973), *its validity would be highly suspect if it were applied to activities which implicate first amendment Rights." Id.*, at 487 (emphasis added).

To exemplify this point, the court then immediately cited to the cases of *Doran, supra, Attwood, supra, Salem Inn, Inc. v. Frank*, 381 F.Supp. 859 (1974), aff'd 522 F.2d 1045 (2d Cir. 1975), *City of Revere v. Aucella*, 369 Mass. 138, 338 N.E.2d 816 (1975), and *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (1976), all cases involving decisions affording constitutional protections to the type of non-obscene nude dancing at issue here. Therefore, the Supreme Court of Illinois has indicated unequivocally that its "public indecency" statute cannot be applied to this type of *nude dancing as entertainment*. The Illinois Court of Appeals has similarly declared that nude dancing is a form of expression which is protected by the first amendment. *City of Chicago v. Hanson*, 105 Ill. App. 3d 1017, 435 N.E.2d 120, 123 (1982), citing *Jamaica Inn, Inc. v. Daley*, 53 Ill. App. 3d 257, 368 N.E.2d 589 (1977), *rev'd on other grounds*, 72 Ill. 2d 415, 381 N.E.2d 694 (1978); and *People v. Better*, 33 Ill. App. 3d 58, 337 N.E.2d 272, 276-277 (1975).

The Wisconsin "lewd and lascivious behavior" statute cited by Petitioners has received similar analysis. The United States District Court in *Reichenberger v. Warren*, 319 F.Supp. 1237 (W.D. Wis. 1970) indicated that, to pass constitutional muster, the term "indecently" as found within the statute, would have to be considered to be equivalent to an analysis of "obscenity", consistent with the elements of such a finding that had been set forth by this Court at that time. *Id.*, at 1238-1239. That court further indicated that "dancing may obviously be a form of expression." See also *Little v. City of Greenfield*, 575 F.Supp. 656, 662 (E.D. Wis. 1983) [holding that "nude dance entertainment is a form of expression within the protective mantle of the first amendment"].

Therefore, the decision of the Seventh Circuit not only does not "potentially invalidate" statutes around the entire country, but it does not even affront the decisions interpreting those statutes that exist in the states in the Seventh Judicial Circuit. Rather, this decision below is consistent with the pronouncements of this Court, and the lower court interpretations of this Court's directives, both at the federal and state levels.

II. THE SEVENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH DECISIONS OF STATE COURTS OF LAST RESORT

To support consideration of this matter by this Court pursuant to Sup. Ct. R. 10.1(a), Petitioners additionally

argue that the decision below is in conflict with the decisions of various state courts of last resort. Petitioners cite ten decisions of various state appellate courts that are claimed to establish this conflict, including two cases decided by the Indiana Supreme Court.

Almost without exception, the cases cited to by the Petitioners predate this Court's statement in *Schad, supra,* that nude dancing was not without first amendment protection from official regulation. *Id.* at 66. Therefore, to the extent that any of the cited decisions reach a conclusion opposite to that below, those decisions are not in conflict with the Seventh Circuit holding, but, are, rather, in conflict with this Court's statement in *Schad*. It is, indeed, illogical to argue that outdated decisions that have been limited by *Schad*, create a conflict with the Seventh Circuit decision below which, in fact, follows *Schad*, such as to invoke jurisdiction of this Court.

Even though the present precedential value of the decisions cited by Petitioners is suspect alone to the extent that they predate *Schad*, further discussion of these decisions is warranted, as Petitioners have failed to apprise this Court of subsequent judicial developments affecting a number of these decisions, and have further misrepresented the holding of many of the decisions that they cite. Sup. Ct. R. 15.1.

Petitioners first rely upon the two Indiana Supreme Court decisions of *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980), and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), arguably the most applicable decisions to this action.

First, *Erhardt* (a three to two decision) does not discuss the constitutional issues of nudity or nude dancing, but, rather, relies upon the Indiana Supreme Court's prior decision in *Baysinger*. See *Erhardt, supra,* at 225-226, and in particular, the dissenting opinions of Hunter, J., and DeBruler, J. Yet, the continued validity of *Baysinger* is called into question by this Court's subsequent decision in *Schad*. More importantly, however, is the simple fact that *Baysinger* involved only a facial overbreadth constitutional attack, *Id.*, 397 N.E.2d at 587, which is not applicable to the "as applied" limited holding at issue here. In fact, in its initial holding in this action, the Seventh Circuit United States Court of Appeals concluded that, consistent with *Baysinger*, the Indiana public indecency statute was not *facially* overbroad. *Glen Theatres, supra* (Petitioners' Appx. 144-146).

Turning then to decisions outside of the State of Indiana, Petitioners cite as the "leading decision" that nude dancing is "conduct, not speech," the Oregon Supreme Court decision of *City of Portland v. Derrington*, 253 Or. 289, 451 P.2d 111, 113-114, (1969), *cert. denied*, 396 U.S. 901 (1969). *Derrington* not only predates *Schad*, but it was decided even before this Court's pronouncements in *LaRue*, and *Doran*. Thus, in deciding *Derrington*, the Oregon Supreme Court did not have the benefit of this Court's reasoning and rationale in those cases that first amendment protections do apply to nude dance entertainment. In addition, it is not insignificant that the legislation upheld in *Derrington* was not a state "indecent exposure" statute, but was, rather, a city ordinance precluding women from baring their breasts in a place where

food or alcoholic beverages were served. *Id.*, 451 P.2d, at 112.

Had *Derrington* been decided after *Doran*, history indicates that the result in that decision would, most likely, have been different. Just one year after this Court's holding in *Doran*, the Oregon Supreme Court interpreted the State's "public indecency" statute, ORS 163.465, *not to apply* to dancing as entertainment before a willing audience. *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976). Similarly, the Oregon Court of Appeals, in addressing a city "indecent exposure" ordinance, subsequently noted that, pursuant to *Brooks*, there is a differentiation between presentations "performed before an audience" and conduct occurring in "places where an unwilling public may be subjected to 'unwanted or shocking displays.'" *City of Portland v. Gatewood*, 76 Or. App. 74, 708 P.2d 615, 619 at fn. 4 (1985), *rev. denied*, 700 Or. 477, 713 P.2d 1058 (1986). That court noted that it is "the latter kind of nudity [acts occurring in places where an unwilling public may be subjected to 'unwanted or shocking displays'] which the ordinance seeks to prevent." *Id.*, at 619 fn 4 (clarification added). The *Gatewood* court upheld the city indecent exposure statute at issue there by limiting its reach to only *non-protected* (i.e. non-expressive) public nudity. *Id.*, at 620.

Finally, any continuing authority that *Derrington* may still have considered to possess in light of *Brooks*, has been eviscerated by the decision of *Sekne v. City of Portland*, 81 Or. App. 630, 726 P.2d 959 (1986). In considering the constitutionality under the Oregon Constitution of two Portland city ordinances that prohibited nudity in taverns and restaurants, the Oregon Court of Appeals

held that nude dancing was, in fact, "expression" entitled to constitutional protection, *id.*, at 962-963, and, while distinguishing *Derrington* as not having evaluated the ordinance there pursuant to state constitutional protections, noted that:

> "The cases cited from other jurisdictions, which uniformly reject the speech/conduct dichotomy, raise serious questions as to the continued validity of *Derrington*'s reasoning under the First Amendment." *Id.*, at 962 fn. 3.[8]

The *Sekne* court then, pursuant to its conclusion that nude dancing was protected expression, declared one ordinance invalid under the State Constitution, and, to save the other, construed it, consistent with *Gatewood*, so as to not apply to nude dancing as entertainment. Without such a narrowing construction, explained the court, the ordinance would have prohibited activity which was protected expression, and would thus be overbroad. *Id.*, at 964.

The decisions in *Brooks*, *Gatewood* and *Sekne* represent the current law in the State of Oregon, are consistent with this Court's decisions, and render *Derrington* a nullity. The law in Oregon today, is not, therefore, in conflict with the Seventh Circuit decision below, but is, rather, totally consistent with it.

Petitioners next cite *Hoffman v. Carson*, 250 So.2d 891 (Fla. 1971), *appeal dismissed for want of substantial federal*

---

[8] *Derrington*'s reasoning can also be distinguished as that ruling was based not exclusively on nude dancing, but also upon nudity of attendants, waitresses and other employees; i.e., non-expressive nudity. *Derrington, supra*, at 113.

question 404 U.S. 981 (1971). Again, it is not insignificant that this decision was rendered prior to this Court's pronouncements in *Schad, Doran,* and even a year before *LaRue*. Nor is it insignificant that the decision in *Hoffman* was predicated upon the Oregon Supreme Court's decision in *Derrington, supra,* which, as discussed above, has, for all practical purposes, been overruled by subsequent case law.

Hoffman also is distinguishable as its ruling precludes a determination of statutory violation upon a finding of mere nudity, but, rather, requires a "lascivious exhibition" *id.*, at 893, which is more akin to a finding of obscenity. *See,* for example, *Goodmakers v. State,* 450 So.2d 888, 890-891 (2d DCA 1984), and *Duvallon v. State,* 404 So.2d 196, 197 (1st DCA 1981).

In addition, in a string of decisions considering the constitutionality of a number of Florida ordinances banning nudity and/or nude dancing, the Eleventh Circuit Court of Appeals has consistently indicated that, in compliance with this Court's pronouncements as set forth above, nude dancing is "expression" warranting constitutional protection. *International Food & Beverage Systems, supra,* at 1525; *Krueger, supra,* at 854; and *Grand Faloon Tavern Inc. v. Wicker,* 670 F.2d 943, 946-947 (11th Cir. 1982), *cert. denied,* 459 U.S. 859 (1982). See also *Function Junction, Inc., v. City of Daytona Beach,* 705 F.Supp. 544, 550 (M.D. Fla. 1988), holding that nude dancing is protected expression under the first amendment. Thus, the *Hoffman* decision has little, if any, relevance today.

Petitioners next contend that *Major Liquors, Inc. v. City of Omaha,* 188 Neb. 628, 198 N.W.2d 483 (1972) is in

conflict with the Seventh Circuit decision, and argue that "[t]he holding did not turn on the fact that alcoholic beverages were served on the premises."[9] Petition, at page 15. Petitioners are, however, in error on this point. First, the ordinance at issue in *Major Liquors, Inc.* was not, as here, an "indecent exposure" law, but was, rather, an ordinance allowing for the revocation of a liquor license if topless dancing by a female was permitted on the premises. *Id.*, at 484.

In addition, the opinion of the Nebraska Supreme Court is almost an exclusive discussion of the inherent powers of the state to regulate the sale of alcohol pursuant to the twenty-first amendment. *Id.*, at 485-487. Indeed, the simple issue for and the decision of the Nebraska Supreme Court is stated as follows:

> "Is the restriction against females dancing when 'topless' or semi-nude an unreasonable regulation of *businesses engaged in dispensing alcoholic liquors*? We conclude that it is not." *Id.*, 486-487 (emphasis added).

Major Liquors Inc. is, therefore, directly in line with this Court's pronouncements in *LaRue, Bellanca,* and *Iacobucci.* However, as the statute at issue here is not predicated upon the state's inherent power under the twenty-first amendment, and since Respondents, here, were not involved in the sale or dispensing of alcoholic

---

[9] This decision is, of course, relevant in a discussion as to whether a state can ban nudity or nude dancing in establishments that serve alcoholic beverages pursuant to its inherent powers under the Twenty-first Amendment. See discussion, *supra.*

beverages, the decision of *Major Liquor, Inc.* is not applicable to the Seventh Circuit's decision, nor in conflict with it.

Petitioners next cite *Robinson v. State*, 253 Ark. 882, 489 S.W.2d 503 (1973). Not only was this case decided prior to this Court's decisions of *Schad* and *Doran*, and is, therefore, in conflict with them, but the "indecent exposure" statute at issue in *Robinson* has been replaced. See Ark.Stat.Ann. Section 5-14-112. That statute[10] has been subsequently discussed and interpreted[11] by the Arkansas Supreme Court in *Young v. Arkansas*, 286 Ark. 413, 692 S.W.2d 752 (1985), *cert. denied*, 474 U.S. 1070 (1986). In *Young*, the Defendant there had argued that her conduct was "mere nude dancing" and therefore entitled to first amendment protection. The Arkansas Supreme Court noted:

> "We do not take issue with that contention, except to note that the statute and activity in this case *do not deal merely with nudity or nude dancing, but with something more as proscribed by the statute*. Appellant makes no argument that the proscribed activity under the statute is entitled to First Amendment protection, only that

---

[10] Ark.Stat.Ann. Section 5-14-112 states, in part: (a) a person commits indecent exposure if, *with purpose to arouse or gratify the sexual desire of himself or any other person*, he exposes his sex organs: (1) in a public place or public view; or (2) under circumstances in which he knows his conduct is likely to cause affront or alarm. * * * (Emphasis added).

[11] *Young*, actually interprets a predecessor statute, Ark.Stat.Ann. Section 41-1812, which, with the exception of renumbering the subsections, is virtually identical to the present statute.

> mere nude dancing is entitled to such protection. As we have said, appellant's conduct in this case was not simple nudity, but conduct that came within the proscriptions of Ark.Stat.Ann. Section 41-1812. As we hold appellant's conduct *not to be mere nudity*, and since appellant does not argue the proscribed activity under the statute is constitutionally protected, there is no need to address the remaining aspects of the arguments." *Id.*, at 754 (emphasis added).

Even Petitioners here acknowledge that *Young* is distinguishable from this action as the dancer, in *Young*, "arguably performed an obscene dance . . . ". Petition, at 14. Thus, the Supreme Court of Arkansas has, subsequent to *Robinson*, followed the precedent of this Court by indicating that non-obscene nude dancing is constitutionally protected. The present judicial interpretation in Arkansas is, therefore, not in conflict with the Seventh Circuit decision below.

Petitioners also rely upon the decision of the Supreme Court of Maine in *Gabriele v. Town of Old Orchard Beach*, 420 A.2d 252 (Me. 1980). It is of interest that *Gabriele* was decided between this Court's dismissal of the appeals in *Baysinger*, and its subsequent decision in *Schaa*. Thus, the *Gabriele* court was not provided with this Court's specific direction in *Schad* that nude dancing is imbued with constitutional protections under the first amendment. More importantly, however, is the simple fact that the ordinance at issue in *Gabriele* regulated, like *Major Liquors, Inc., supra*, nudity in businesses licensed to sell alcoholic beverages. *Id.*, at 253-254.

Significantly, the *Gabriele* court relied upon this Court's decisions in *LaRue* and *Doran* indicating that, pursuant to the inherent powers to regulate the sale of liquor conferred by the twenty-first amendment, states could ban nude dancing in establishments that serve alcohol. *Id.*, at 254-255. Indeed, the decision in *Gabriele* states:

> "Hence, in the circumstances of the instant case the prohibition of nude dancing presented as live entertainment in plaintiff's tavern *was an exercise of powers conferred by the Twenty-first Amendment which did not transgress the independent protections afforded speech or expression by the First-Fourteenth Amendments.*" *Id.*, at 257 (emphasis added).

Petitioners are therefore in error when they state that the court's conclusion in *Gabriele* was based "primarily on the nature of the dancing." Rather, it was based, as that Court expressly stated, upon the authority of the twenty-first amendment, which is not at issue here.

Petitioners also cite two cases from Louisiana, *State v. Walters*, 440 So.2d 115 (La. 1983), and *State v. Jacobson*, 459 So.2d 1285 (La. App. 1984), *writ denied*, 463 So.2d 599 (La. 1985), claiming that those courts had found no first amendment violation in applying Louisiana's *"indecent exposure"* statute to women exhibiting their genitals in glass booths without music, or to nude dancers. Petition, at 16 (emphasis added). Petitioners are in error as to the nature of the statute involved in those cases. Both prosecutions were premised upon the Louisiana *obscenity*

statute, LSA-R.S. 14:106,[12] and not upon a statute, as here, rendering simple "public nudity" a crime. Therefore, these two decisions are inapplicable to the circumstances at issue in this case for the same reason that Petitioners acknowledge *Young v. Arkansas, supra,* to be irrelevant; that being that the conduct in those cases went beyond mere nudity or dancing, and transgressed into the arena of obscenity. In fact, the Louisiana Supreme Court noted in *Walters* that it was *not* deciding constitutional questions regarding the State's right to regulate all forms of live conduct, including legitimate dance by naked persons. *Id.*, at 122. In addition, as acknowledged by the Petitioners, *Walters* did not even involve dance, hence did not involve "expression", and therefore is irrelevant in any comparison to this action.

Finally, Petitioners note the Michigan Court of Appeals decision of *People v. Wilson*, 95 Mich. App. 440, 291 N.W.2d 73 (1980), *leave to appeal denied*, 409 Mich. 925 (1980), stating that that court had concluded that Michigan's indecent exposure statute could be constitutionally applied to nude dancing because it was not designed to prohibit speech. While there is no question that the prosecution in *Wilson* was brought pursuant to the Michigan

---

[12] That statute states, in part:

"A. The crime of obscenity is the intentional:

(1) Exposure of the genitals, pubic hair, anus, vulva, or female breast nipple in any public place or place open to the public view *with the intent of arousing sexual desire which appeals to prurient interest or is patently offensive.*" * * * (Emphasis added).

indecent exposure statute, M.C.L. Section 750.335a, it is similarly clear that the conduct discussed in *Wilson* was not mere "nude dancing", but was rather determined by the Michigan Court of Appeals to be *obscene* conduct.[13] Therefore, similarly, this case has no relevance to the action at issue which involves mere nude dancing.

Yet, *Wilson* is inapplicable here for another reason, as the Defendant in *Wilson* had constitutionally challenged the statute only "on its face" and not, as here, as applied. The Michigan Court of Appeals noted, in rejecting this facial overbreadth challenge, that there were "a substantial number of situations to which the statute can validly be applied and that there is no substantial overbreadth." *Id.*, at 75. Similarly, as indicated above, the Seventh Circuit here, in its initial decision to this matter, concluded that the instant statute at issue here was not *facially* overbroad. *Glen Theatres, supra* (Petitioners' Appx. 144-146). Conversely, upon remand, the constitutional *application* of the Indiana Statute was the sole issue to be decided, and the overbreadth later found by the Seventh Circuit was only *as applied* to the type of nude dancing at

---

[13] "At the hearing held on the Motion to Quash, Plaintiff stated that the charge was brought *not for nude dancing* but rather for the on-stage act of masturbation." *Id.*, at 73. The State further argued that the conduct "was clearly 'hard core' sexual conduct and hence not entitled to any First Amendment protection." *Id.*, at 74. "The State has valid interests which it can seek to protect by the regulation of commercialized *obscenity*." *Id.*, at 74 (emphasis added). "The alleged conduct of the Defendant in this case is *'hard core' sexual conduct* which can constitutionally be prohibited by the State." *Id.*, at 74 (emphasis added).

issue. Petitioners reliance upon *Wilson* is therefore erroneous.

For the reasons as set forth above, the En Banc decision of the Seventh Circuit below is not in conflict with any relevant decision of a state court of last resort that still retains precedential value.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

KLEIN & SHAFER, P.C.

BRADLEY J. SHAFER, P36604*
LEE J. KLEIN, P25186
KLEIN & SHAFER, P.C.
Attorneys for Respondents Glen Theatre, Inc., Carla Johnson, and Gayle Ann Marie Sutro
4121 Okemos Road
Suite 20
Okemos, MI 48864
517-349-8666

*Counsel of Record

APPENDIX

Page

1. Order of the United States Seventh Circuit Court of Appeals..... App. 1

2. Affidavit of Gayle Ann Marie Sutro..... App. 3

APPENDIX I

UNITED STATED COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: May 24, 1990

BEFORE: Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 88-3006

DARLENE MILLER, et al.,

Plaintiffs – Appellants

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants – Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 85 C 598, Judge Allen Sharp

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this Court that the judgment of the District Court in this cause appealed from be, and the same

is hereby, REVERSED, with costs, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with the opinion of this Court filed this date.

APPENDIX II

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., et al., Plaintiffs, vs. CIVIL CITY OF SOUTH BEND, et al., Defendants.	)	CAUSE NUMBER S85-0353

AFFIDAVIT OF GAYLE ANN MARIE SUTRO

Comes now Gayle Ann Marie Sutro and having been duly sworn does depose and say as follows:

1. I am one of the plaintiffs herein.

2. I am a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years.

3. I have degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California.

4. I have studied acting, dance (including ballet, jazz, tap, and exotic dance), and speech and languages.

5. I am a current member in good standing of the Screen Actors Guild, the Screen Extras guild, and AFTRA.

6. My theatrical and television credits include performances as an actress and stunt woman in movies

including Night Shift, Blues Brothers, and several adult films.

7. My acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's, Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide.

8. I have an extensive modeling career and have modeled for photographs in such magazines as Penthouse, Shape, Fitness, and New Body.

9. I have performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, and I have as an integral part of my dance removed my clothes and danced nude in an art form I consider to be artistic.

10. My nude dance performances are appropriately choreographed and are an attempt to communicate as well as to entertain.

11. I have scheduled, through my agent and plaintiff Glen Theatre, Inc., to make a personal appearance in conjunction with a South Bend area showing of one of my motion picture films at the Chippewa Drive-In.

12. I have agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, my dance production at various times and days throughout the summer and fall of 1985 commencing with the week of July 15, 1985.

Further affiant saith not.

/s/ Gayle Ann Marie Sutro
Gayle Ann Marie Sutro

STATE OF INDIANA)
) SS:
ST. JOSEPH COUNTY)

Subscribed and sworn to before me, a Notary Public residing in said County and State this 8th day of July, 1985.

/s/ Cathy DeMarco
Cathy DeMarco,
Notary Public

My commission expires:

August 17, 1987

CERTIFICATE OF SERVICE

I hereby certify that I served a true copy of the foregoing AFFIDAVIT OF GAYLE ANN MARIE SUTRO upon Mr. Robert C. Rosenfeld, Assistant City Attorney, Office of City Attorney, County-City Building, South Bend, Indiana, 46601; and Mr. William Daily, Deputy Attorney General, Office of Attorney General, 219 State House, Indianapolis, Indiana, 46204, by United States mails, first class postage prepaid, this 8th day of July 1985.

/s/ Cathy DeMarco for
Charles A. Asher

Supreme Court, U.S.
FILED
JUL 30 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC. *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et. al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION BY RESPONDENTS DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC.

PATRICK LOUIS BAUDE
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927
(*Counsel of Record*)

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341

Counsel for Respondents Darlene Miller and JR's Kitty Kat Lounge, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

RULE 29.1 LISTING

JR's Kitty Kat Lounge, Inc., is an Indiana corporation. It has no parent or subsidiary corporations.

Respondents Darlene Miller and JR's Kitty Kat Lounge respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Seventh Circuit.

REASONS WHY THE PETITION SHOULD BE DENIED

1. THE UNCONSTITUTIONALITY OF A TOTAL BAN ON NUDE DANCING HAS BEEN SETTLED BY THIS COURT.

In 1979, the Indiana Supreme Court held that the state's public indecency statute constitutionally applied to dancing in the nude because "This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeal dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980). Nude dancing itself could therefore logically never be protected by the First Amendment, although the Court reserved judgment whether nude dancing might acquire protection "within the context of a play, ballet, book or other material." 397 N.E.2d at 586.

Two years later, this Court held that "nude dancing is not without its First Amendment protections. . . . " *Schad v. Mt. Ephraim*, 452 U.S. 61, 66 (1981). These two propositions are necessarily inconsistent with each other and, of course, this Court's opinion controls. That is all the Court of Appeals for the Seventh Circuit held in this case,

striking down Indiana's "total ban at issue here." Appendix at 16. The holding below, as the State of Indiana acknowledges in its petition on page 8, is the same conclusion reached by every Circuit to consider the question. The State argues instead that the Court of Appeals' decision is in conflict with some state courts of last resort. Except for Louisiana, *every case* cited by the petitioner was decided before this Court's decision in *Schad*. The Louisiana Supreme court case, *State v. Walters*, 440 So. 2d 115 (La. Sup. Ct. 1983), involved a conviction for attempted obscenity of a woman who, without musical accompaniment, provided a "close and unobstructed view of her vagina" while making thrusting movements. 440 So. 2d at 118. In the present case, the Court of Appeals explicitly pointed out that Indiana "most certainly may ban obscene nude dancing." Appendix at 15.

2. THIS CASE IS NOT AN APPROPRIATE OPPORTUNITY TO CONSIDER THE UNRESOLVED CONSTITUTIONAL QUESTIONS RAISED BY MEASURED STATE REGULATION OF NUDE DANCING.

A. Regulations.

Nude dancing may well not be entitled to the same full measure of constitutional protection as presidential debates. This Court may well find it appropriate to review other regulatory schemes like that in *FW/PBS, Inc. v. City of Dallas*, 110 Sup. Ct. 596 (1990). The issue presented by this Indiana statute as it has been interpreted, however, is a total ban. The state's petition for certiorari says on page 12 that "It is not hyperbolic to suggest that the Seventh Circuit's holding brings within the First

Amendment any person who appears nude in any public place, as long as he or she is dancing." In fact, the majority opinion explicitly holds that "legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks and beaches." Appendix at 15.

B. Distinctions

Unresolved questions might also arise if a state attempted to articulate a legal standard defining a subcategory of nude dancing which was prohibited. No such standard is articulated in the Indiana statute; the Indiana Supreme Court has held only that nude dancing is conduct, not speech; and the prosecuting authorities of the state have unrelentingly argued this case without attempting to suggest relevant legal distinctions of motive or degree.

On pages 12-13 of its petition for certiorari, the state says "this case potentially invalidates the indecent exposure or public indecency statutes of 17 states (in addition to Indiana) with statutes that proscribe public nudity without expressly requiring lack of consent or offense on the part of the viewer." This statement is supported by a footnote which cites without comment the statutes of twenty-two states. Whatever the number of states to which Indiana means to point, an examination of the cited statutes themselves reveals that the majority of these states, unlike Indiana, do not simply prohibit "nudity" but instead define a subcategory of prohibited nudity.

One common limitation is to prohibit exposure of the genitals "for the purpose of gratifying or arousing sexual desire." Such a limitation is, for example, contained in the Model Penal Code's definition of indecent exposure as part of a plan to limit that crime to "deviate and aggressive sexual exposure." American Law Institute, Model Penal Code and Commentaries, Section 213.5 at 408 (1980). Among the statutes Indiana lists in its petition for certiorari, such mens rea language is found in the cited sections for Arkansas, Colorado, Connecticut, Illinois, Kansas, Oregon (The state's petition cites section 163.445 of the Oregon statutes. That section is a statutory rape section. Respondent believes that petitioner meant to cite 163.465), and Wyoming.

Another common limitation in the cited statutes is to prohibit "lewd" exposure. The Model Penal Code also uses the word "lewd" because it does not include all nudity. "[N]udity may constitute a "lewd act" in appropriate circumstances." American Law Institute, Model Penal Code and Commentaries, Section 251.1 at 450 (1980). Among the statutes listed in the petition for certiorari, lewdness is required in Delaware, Georgia, Illinois, Mississippi and Vermont. Others of the statutes have other limitations, such as "malicious" in South Carolina or "obscene" in Virginia. Respondent believes this point was accurately generalized by Judge Posner's concurring opinion below, when he observed that "Indiana is exceptional although not unique among contemporary American states in attempting, without recourse to the Twenty-First Amendment, to impose a state-wide ban on erotic dance performances that are not obscene, merely because the performances involve nudity – and a bare

breast is nudity within the meaning of the Indiana statute." Appendix at 19.

CONCLUSION

This case involves an extreme statute which the state has made no effort to limit or reconcile with this Court's prior holdings. In its unlimited form, the issue of whether nude dancing is entitled to some protection has already been settled by this Court. For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

PATRICK LOUIS BAUDE
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927
(Counsel of Record)

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341

Counsel for Respondents

Supreme Court, U.S.
FILED
AUG 27 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO AND CARLA JOHNSON

BRADLEY J. SHAFER*
LEE J. KLEIN
KLEIN & SHAFER, P.C.
4121 Okemos Rd.
Suite 20
Okemos, MI 48864
(517) 349-8666
Attorneys for Respondents, Glen Theatre, Inc., Carla Johnson, and Gayle Ann Marie Sutro

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents.

SUPPLEMENTAL BRIEF ON BEHALF OF RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO AND CARLA JOHNSON

Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson respectfully submit this supplemental brief pursuant to Sup. Ct. R. 15.7 to bring to the attention of this Court a subsequent decision filed by the Eighth Circuit Court of Appeals, and to correct a misstatement as to the procedural history of this case in the Amici Curiae Brief filed on behalf of the States of Arizona, Connecticut, Missouri, North Carolina and Pennsylvania.

I.

THE DECISION OF THE EIGHTH CIRCUIT COURT OF APPEALS

Subsequent to the filing of Respondents' Brief in Opposition to Petition for a Writ of Certiorari, the Eighth Circuit Court of Appeals issued a decision in *Walker v. City of Kansas City*, No.'s 89-1001 & 89-1057 (8th Cir. August 7, 1990) (copy attached beginning at App. 1) which Respondents are bound to bring to the attention of this Court.

Walker involved the constitutionality of a zoning ordinance regulating the location of certain adult oriented businesses, including those providing nude dance entertainment. The questioned ordinance was upheld against constitutional attack pursuant to the authority conferred to the States by the twenty-first amendment regarding the sale and distribution of alcoholic beverages. Since Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro and Carla Johnson were not engaged in the sale or distribution of alcoholic beverages, *Walker* is facially dissimilar to and distinguishable from the Seventh Circuit decision below. However, due to a discussion as to the constitutional protections afforded nude dance entertainment by the author of the *Walker* decision, the Respondents are compelled to bring this decision to the attention of this Court, and to discuss that opinion.

Walker, supra, represents a decision of a divided Eighth Circuit, with Chief Judge Lay dissenting from both the holding and the opinion, and with Judge Dumbauld[1] concurring only in part III of the opinion of Judge Bowman, the majority author. The fractionalization of the positions of the three Judges is relevant to the consideration by this Court of the *Walker* decision, and its applicability, if at all, to the instant case, as Judge Bowman's

---

[1] The Honorable Edward Dumbauld is a Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

majority opinion contains a lengthy discussion (at part II of that opinion) of his position that what he describes as "go-go" dancing (slip op. at 4; App. 5) is not expression protected by the First Amendment, and, therefore, to that extent, arguably conflicts with the Seventh Circuit decision here in issue. In reaching this conclusion, Judge Bowman specifically notes his disagreement with the instant holding of the Seventh Circuit. See, generally, *Walker, supra*, slip op. at 7-17 (App. 9-21).

However, a review of the entire *Walker* decision illustrates that this position and conclusion reached by Judge Bowman (and contained as part of the majority opinion) is *acknowledged* to be mere dicta, was neither shared by, nor joined in by the other two circuit judges, and, consequently, represents only the single opinion of Judge Bowman himself. As such, this position of Judge Bowman does not represent a majority opinion or holding of the Eighth Circuit, and, therefore, is not in conflict to the decision of the Seventh Circuit here below.

Chief Judge Lay, in his dissenting opinion in *Walker*, clearly indicates his disagreement with part II of Judge Bowman's opinion (holding nude dancing to be unprotected). *Walker*, slip op. at 34 (Lay, C.J., dissenting) (App. 41) ["not only is the discussion on the first amendment advisory and pure dicta, it is also clearly wrong"]. Judge Lay further, correctly, notes that "no other circuit court of which I am aware has deprived entertainment businesses first amendment protection for dancing." *Id.*, slip op. at 34 (Lay, C.J., dissenting) (App. 41-42).

The concurring opinion of Judge Dumbauld similarly establishes Judge Bowman's position regarding the constitutional protection of nude dancing as entertainment to be mere dicta. Judge Dumbauld unequivocally indicates that it is his opinion that the legislation there at issue can be sustained under the inherent powers of the twenty-first amendment regarding the sale and distribution of alcoholic beverages, believes Judge Bowman's opinion to "firmly rest" on that proposition, and therefore concurs in only part III of Judge Bowman's opinion (that part that

discusses the twenty-first amendment issue). *Id.*, slip op. at 31-33 (App. 37-40). With regard to part II of Judge Bowman's opinion arguing that the first amendment does not protect nude dance entertainment, Judge Dumbauld describes Judge Bowman's dissertation in this regard as "massive *obiter dictum*, or in his own pithy phrase 'gratuitously pedagogic.' " *Id.*, slip op. at 33 fn. 6 (App. 40 fn. 6).

Even Judge Bowman's opinion and decision indicates that *Walker* is not decided upon the conclusion that nude dance entertainment is not protected by the first amendment, but is, rather, decided upon the inherent powers of the twenty-first amendment. Judge Bowman acknowledges that:

> "The dissent correctly points out that our comments on the doubtful standing of go-go as First Amendment speech are dicta. . . . We do not rest our decision in this case on the First Amendment because we do need to: the Twenty-first Amendment compels the result, thus preempting the First Amendment issue." *Id.*, slip op. at 17-18 fn. 12 (App. 21 fn. 12).

Judge Bowman then sustained the legislation at issue predicated upon the inherent powers of the States as found in the twenty-first amendment. *Id.*, slip op. at 18-19, 21, 23 and 30 (App. 22-23, 26, 28 and 37).

As *Walker* does not hold, either in its decision or as part of its majority opinion, that nude dance entertainment is devoid of constitutional protections, as *Walker* is firmly grounded upon inherent powers of the States to regulate the sale and distribution of alcoholic beverages pursuant to the twenty-first amendment (and is therefore in accord with all other cases that have decided this issue), and since the Respondents here were not involved in the sale or distribution of alcoholic beverages, *Walker* is inapplicable to the factual situation concerning these Respondents, and is, therefore, not inconsistent with the Seventh Circuit decision such as to warrant this Court to grant Certiorari pursuant to Sup. Ct. R. 10.1(a).

II.

THE ISSUE OF MOOTNESS ASSERTED IN THE AMICI CURIAE BRIEF

In its brief as Amici Curiae, the States of Arizona, Connecticut, Missouri, North Carolina and Pennsylvania state, with regard to the procedural aspects of this case:

> "A third case, involving Plaintiff Glen Theatre (i.e. the instant Respondents), did not involve the sale or presence of alcoholic beverages. *The establishment in the latter case was destroyed by fire and that cause of action thereby became moot.*" (Emphasis and clarification added).

This assertion (based upon a statement of the district court in *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 416 (N.D. Ind. 1988)) is in error, as the establishment of Glen Theatre was never destroyed by fire, and its cause of action has, therefore, not been rendered moot. This error by the district court was subsequently corrected in an unreported Memorandum and Order. See acknowledgement of this procedural history in Petitioners' Petition for a Writ of Certiorari, at page 6 fn. 1. The Memorandum and Order of the district court dated October 21, 1988 correcting the erroneous finding of mootness is contained in the Petitioners' Appendix to Petition for Writ of Certiorari, at App. 136-139. Therefore, the statement by Amici is in error, and the claims of these Respondents are not moot.

Respectfully submitted,

KLEIN & SHAFER, P.C.

*BRADLEY J. SHAFER, P36604
LEE J. KLEIN, P25186
Attorneys for Respondents Glen Theatre, Inc., Carla Johnson and Gayle Ann Marie Sutro
4121 Okemos Road
Suite 20
Okemos, MI 48864
517-349-8666

*Counsel of Record

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 89-1001

Joe E. Walker, Jr., d/b/a Last Chance Lounge, Appellant, v. City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp, Appellees.	*	Appeal from the United States District Court for the Western District of Missouri.

No. 89-1057

Joe E. Walker, Jr., d/b/a Last Chance Lounge, Appellee, v. City of Kansas City, Missouri; Richard L. Berkley, Mayor of Kansas City, Missouri; The City Council of Kansas City, Missouri; Chuck Weber; Sally Johnson; Frank Palermo; Robert M. Hernandez; Joanne M. Collins; Charles A. Hazley; Dan Cofran; Katheryn Shields; Emanuel Cleaver; Mark Bryant; John A. Sharp, Appellants.	*	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 16, 1989

Filed: August 7, 1990

Before LAY, Chief Judge, BOWMAN, Circuit Judge, and DUMBAULD,* Senior District Judge.

BOWMAN, Circuit Judge.

* The HONORABLE EDWARD DUMBAULD, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

In June 1985, appellant Joe E. Walker, Jr., submitted a rezoning application to the Kansas City Plan Commission requesting that his property be granted a District C-X zoning classification, which would permit him to display go-go girls in his drinking establishment, the Last Chance Lounge. The Commission recommended approval of the zoning change, which permitted Walker's application to be forwarded to the City Council for consideration. Kansas City, Mo., Zoning Ordinance § 39.360(I) (1987). The Plans and Zoning Committee of the City Council held a series of hearings on the application, but over a year passed without a decision. Shortly before the City Council denied his application, Walker brought suit under 42 U.S.C. § 1983 against Kansas City and its Mayor and Council Members alleging that they had violated his constitutional rights to free speech and due process and that the defendants had conspired to deprive him of his civil rights. He sought both an injunction and damages. After a hearing on Walker's motion for a preliminary injunction, which was converted into a trial on the merits of the case, the District Court found no due process violation, but held that the zoning ordinance violated Walker's First Amendment rights. *Walker v. City of Kansas City, Mo.* (*Walker I*), 691 F. Supp. 1243 (W.D. Mo. 1988). Following hearings on the scope of relief, the court enjoined the city from enforcing the ordinance against Walker and, rejecting Walker's argument for compensatory damages, awarded nominal damages. *Walker v. City of Kansas City, Mo.* (*Walker II*), 697 F. Supp. 1088 (W.D. Mo. 1988). The court also awarded attorney fees to Walker. On Appeal, Walker contests the trial court's dismissal of the individual City Council members, rejection of his due process

claim, limitation of damages to nominal rather than compensatory, and denial of his motion for a new trial on the compensatory damages issue. The city cross-appeals the court's First Amendment holding and the award of nominal damages and attorney fees. We reverse the judgment for Walker on his First Amendment claim and vacate the injunction and the award of nominal damages and attorney fees. In all other respects, we affirm.[1]

I.

Section 39.156(II) of the Kansas City Zoning Ordinance requires that a District C-X classification be approved by the City Council antecedent to the establishment of a variety of sex-related businesses,[2] including that which Walker intended to institute in the Last Chance Lounge – "exotic dancing." An "exotic dance facility" is defined in the ordinance as

---

[1] In the proceedings in the District Court Walker occasionally alluded to his claim of a conspiracy among the council members to deny his constitutional rights. He did not develop this claim, however, and the court did not address it. Walker raises no issue on appeal with respect to this claim. We take it to have been abandoned. In any event, it appears to be devoid of substance.

[2] Section 39.156 concerns "[a]dult book stores, adult entertainment facilities, adult theaters, bath houses, massage shops, modeling studios and artists-body painting studios, and exotic dance facilities." Kansas City, Mo., Zoning Ordinance § 39.156(II) (1987). At least some of these enterprises involve activities unrelated to speech and therefore are wholly without First Amendment protection. *See FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604 (1990).

> Any building, structure or facility which contains, or is used for commercial entertainment, where the patron directly or indirectly is charged a fee to observe "specified anatomical areas," provided that the genitals and pubic area of all persons and the areola and nipple of the breasts of all female persons are opaquely covered.

"Specified anatomical areas" entail:

1. Less than completely or opaquely covered:
   (a) Human genitals, pubic region,
   (b) Buttocks,
   (c) Female breast area below a point immediately above the top of the areola.
2. Human male genitals in a discernibly turgid state even if completely and opaquely covered.

Kansas City, Mo., Zoning Ordinance § 39.156(I)(I)&(P).

The particular brand of exotic dancing we deal with here – it was stressed by John Frankum, the attorney representing Walker during the Council hearings[3] – is go-go dancing. Frankum objected to the derogatory connotation implicit in the term "exotic dancers," claiming that the expression was misleading. The sort of person who is interested in go-go dancers, he explained, would not necessarily be "something less than someone who would want to watch the Kansas City Symphony." Amending ch.

---

[3] These hearings were before a subgroup of the City Council, the Plans and Zoning Committee, which ordinarily makes a recommendation to the full Council before that body decides to approve or deny an application for rezoning.

65, Rev. Ordinances of Kansas City, Mo. 1956: Summary of Hearings on § 65.010A1952, Plans and Zoning Committee [hereinafter Zoning Committee Hearings] (May 7, 1987) (paraphrased statements of John Frankum). However characterized, Walker planned for his go-go girls to dance, for the pleasure of the customers of his bar, attired in bikini bottoms and "pasties," *i.e.*, adhesive material covering only the areolas of the girls' breasts. The girls would be permitted by Walker, however, to cover more of their breasts, as they preferred. *Id.* (statements of John Frankum). In any event, the sort of entertainment Walker hoped to provide at his establishment is undoubtedly covered by section 39.156 of the Kansas City zoning ordinance, and Walker does not argue to the contrary.

Because the Last Chance Lounge is located within one thousand feet of a residential district, Walker was not eligible for a District C-X classification for that property unless he could obtain the signatures of a simple majority of the residents and property owners within a radius of one thousand feet. There is no time limit to acquiring the signatures and so, ten months after filing his application, Walker presented the City Plan Commission with a waiver petition containing the names of nineteen of the thirty-seven residents located near his lounge.[4] That same day, in April 1986, the Commission approved the waiver

[4] Shortly thereafter one of the nineteen attempted to retract his consent, which would, of course, have defeated Walker's eligibility to apply for District C-X zoning. The City Plan Commission, however, would not permit a retraction.

and recommended approval of the application, which was forwarded to the City Council.[5]

The Plans and Zoning Committee of the City Council discussed Walker's application at length during a series of meetings held at intervals throughout the ensuing period of approximately twenty months. Presentations by citizens opposed to the rezoning classification consumed the bulk of the hearings; indeed, except for the remarks of Council members and Walker's attorneys, discussion at the meetings consisted entirely of the protestations of private citizens in opposition to the rezoning. In all, roughly forty to fifty people spoke against the zoning change.[6] Zoning Committee Hearings (May 28, 1987). Eventually the matter reached the full Council (without a recommendation from the committee), and on December 17, 1987, the Council voted to reject the application.

In October 1987, approximately two months before the Council's vote, Walker brought this lawsuit alleging that the zoning ordinance violated his free speech and due process rights under the First, Fifth, and Fourteenth

[5] Although neither party comments upon this, the Commission's virtually instantaneous approval of Walker's application was apparently in violation of the Zoning Ordinance, which requires – prior to the issuance of a recommendation – "due public notice and hearings, at which parties in interest and citizens shall have an opportunity to be heard." Kansas City, Mo., Zoning Ordinance § 39.360(I) (1987).

[6] In addition, at one of the hearings "about 30" members of the audience stood when a speaker asked all those opposed to the rezoning to stand. At least two lists containing signatures of others in opposition were submitted to the Committee. Zoning Committee Hearings (May 14, 1987).

Amendments of the United States Constitution. In December he moved for a temporary restraining order and a preliminary injunction. Failing to pursue this motion, Walker filed a renewed motion for a preliminary injunction some weeks later. In the interim the city and the Council members – whom Walker had sued in their individual capacities – filed a motion to dismiss, which the District Court granted as to the individual Council members. Subsequent to the hearing on the preliminary injunction, the parties agreed to treat that hearing as a trial on the merits and thus submitted post-trial briefs. In addition to the testimony adduced at the hearing, the court received reams of city documents and videotapes of various City Council meetings. In June 1988, the District Court issued its memorandum opinion and order in which the court rejected Walker's due process claims but found a violation of his First Amendment rights. *Walker I*, 691 F. Supp. 1243 (W.D. Mo. 1988). After additional hearings, the court entered an injunction prohibiting the city from enforcing the ordinance against Walker and awarded Walker nominal damages, but denied compensatory damages, finding that the evidence was insufficient to establish the amount of such damages with reasonable certainty. *Walker* II, 697 F. Supp. 1088 (W.D. Mo. 1988). The parties subsequently stipulated to the award of attorney fees and the court entered an order approving the stipulation on November 22, 1988.

We affirm the District Court's denial of Walker's due process claims but reverse its judgment for Walker on his First Amendment claim. Accordingly, we vacate the injunction and the award of nominal damages and attorney fees. Our decision moots Walker's claim against the

City Council members in their individual capacities and his claim for compensatory damages.

II.

Walker asserts that the entertainment he proposed to introduce at the Last Chance Lounge – pasty-clad dancing girls – constitutes "speech" within the meaning of the First Amendment "[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 n.5 (1984). Although the burden is thus his, Walker cites only the dictum from one Supreme Court case suggesting that nude dancing is protected speech while ignoring no small amount of dicta – as well as actual holdings – from other cases indicating the contrary.

The statement upon which Walker rests the entire force of his claim that semi-nude dancing girls constitute protected speech is taken from *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), a case involving a statute that prohibited *all* live entertainment within Mount Ephraim: "no property in the Borough may be principally used for the commercial production of plays, concerts, musicals, dance, or any other form of live entertainment." 452 U.S. at 66. The live entertainment appellants in that case proposed to introduce to the city of Mount Ephraim was, in fact, nude dancing. But the Court invalidated the ordinance on overbreadth grounds alone: "Whatever First Amendment protection should be extended to nude dancing, live or on film, however, the Mount Ephraim ordinance prohibits all live entertainment in the

Borough . . . . " *Id.* Consequently, the Court's statement that "nude dancing is not without its First Amendment protections," 452 U.S. at 66, is unadulterated dicta – and dicta quite wide of the holding. Indeed the author of that very statement, Justice White, has subsequently explicitly stated that the Court has never decided whether nude dancing is entitled to any First Amendment protection. *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J., dissenting from denial of certiorari); *see also New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 718-19 (1981) (Stevens, J., dissenting).

Were there no other statements from Supreme Court opinions relevant to the First Amendment status of nude or semi-nude dancing, this dictum would merit some deference. There have, however, been many such emanations from the Court relevant to this question, and examples of these that seem to confute Walker's bald assertion are not wanting. Thus, for example, the Court has stated: "[N]udity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live . . . nudity can be exhibited or sold without limit in such public places." *Miller v. California*, 413 U.S. 15, 25-26 (1973). Appended as a footnote to that statement is this one: "Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior." 413 U.S. at 26 n.8. In *Paris Adult Theater I v. Slaton*, 413 U.S. 49 (1973), the Court stated:

> Conduct or depictions of conduct that the state police power can prohibit on a public street do

> not become automatically protected by the Constitution merely because the conduct is moved to a bar or a "live" theater stage, any more than a "live" performance of a man and woman looked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue.

413 U.S. at 67. And again in *California v. Larue*, 409 U.S. 109 (1972), the majority opinion noted: "[A]s the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases." 409 U.S. at 117.

Even Justice Douglas – famous for his dissents in many First Amendment cases (including each of the cases quoted above) – in which he asserted that any number of pornographic items constituted protected speech[7]

---

[7] Interestingly, though Justice Douglas dissented in *Larue* only because the California regulations challenged in that case – which prohibited live sexual entertainment in bars – had not yet been enforced against anyone. He explicitly accepted the majority's discussion of the First Amendment status of nude dancing, 409 U.S. at 116-18, even though the Court's holding was not based exclusively on its finding that the performances at issue more closely resembled conduct than expression. Thus, Justice Douglas wrote:

> The line which the Court draws between "expression" and "conduct" is generally accurate; and it also accurately describes in general the reach of the police power of a State when "expression" and "conduct" are closely brigaded. But we still do not know how broadly or narrowly these rules will be applied.

409 U.S. at 121 (Douglas, J., dissenting).

– apparently would have drawn the line at "exotic" dancing. Thus, he wrote: "I assume there is nothing in the Constitution which forbids Congress from . . . proscrib[ing] *conduct* on the grounds of good morals. *No one would suggest that the First Amendment permits nudity in public places. . . . " Roth v. United States,* 354 U.S. 476, 514 (1957) (Douglas, J., dissenting) (emphasis added to second sentence). In a later case – and later dissent – Justice Douglas noted the historical roots of the distinction he drew between sexually explicit – indeed obscene – literature and actual people shedding their clothes in public places:

> The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden, contra pacem, and to the scandal of the Government." *Sir Charles Sydlyes Case,* 83 Eng. Rep. 1146-1147 (K. B. 1663). Rather than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. *E.g., Bradlaugh v. Queen,* L.R. 3 Q.B. 569, 634 (1878); *Rex v. Curl,* 93 Eng. Rep. 849, 851 (K. B. 1727) (Fortescue, J., dissenting).

United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 134 (1973) (Douglas, J., dissenting). If there is a distinction between Sir Charles's disrobing and the go-go girls' performance at the Last Chance Lounge, it at least cannot be said that that distinction lies in the lack of expressiveness of Sir Charles's conduct.

That some lower courts have found nude dancing to be protected speech, thus entering territory that even the First Amendment "absolutist" Justice Douglas considered beyond the pale, calls to mind the cautionary dictate periodically invoked by the Court regarding the tendency of "[a]ll rights . . . to declare themselves absolute to their logical extreme." *Hudson County Water Co. v. McCarter,* 209 U.S. 349, 355 (1908) (Holmes, J.).

> The seductive plausibility of single steps in a chain of evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

12 200-Ft. Reels, 413 U.S. at 127 (citations omitted). The indicators that an "end result . . . that would never have been seriously considered in the first instance" may be reached when the performances of "go-go girls" are accorded First Amendment protection include not only the rather clear statements to the contrary in various Supreme Court opinions, but also the clash such a result produces with other constitutional principles. Like all other rights, the right to express oneself freely is "limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached." *Hudson County Water Co.,* 209 U.S. at 355 (Holmes, J.). When "expression" takes the

form of go-go dancing, it may be that those other principles are ascendant.

One of the neighboring principles with which "go-go" dancing as protected speech must inevitably collide is that which holds obscene speech unprotected by the First Amendment. Obscenity is defined as material that " 'the average person, applying contemporary community standards' would find . . . taken as a whole, appeals to the prurient interest; . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law, and . . . taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. at 24 (citations omitted). Scantily clad barroom dancing girls are unlikely to find safe haven in the final two criteria of the obscenity test: an informal catalogue of only those attempts by cities to regulate or prohibit such conduct that reach the courts establishes beyond cavil that entertainment such as that in the Last Chance Lounge is commonly deemed offensive and degrading,[8] and "[p]ublic nudity is . . . prohibited in every state." *Miller v. Civil City of South Bend*, No. 88-3306/3244, slip op. at 101 (7th Cir. May 24, 1990) (en banc) (Manion, J., dissenting). Moreover, even those who would hold such conduct protected speech make no pretension that near-naked girls jiggling for the

[8] *See Paris Adult Theater*, 413 U.S. at 63 ("The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.").

titillation of the boozing clientele at a bar have any "serious literary, artistic, political, or scientific value."[9] If such behavior is to escape the obscenity guillotine, therefore, it must not define its expressive quality as an appeal to the prurient interest. This presents something of a conundrum for those who would describe such behavior as protected speech. To the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment "speech," it may contain a message that nonetheless is categorically unprotected by the First Amendment – that is, an appeal to the prurient interest.

In one of the most expert linguistic navigations imaginable between the Scylla of "nonexpression" and Charydbis of "expression appealing to the prurient interest," one court has described the communicative value of such dancing thus: "The dominant theme communicated here by the [nude female] dancers is an emotional one; it is one of eroticism and sensuality [– t]hough this dance is clearly of inferior artistic and aesthetic quality as contrasted with classic ballet . . . . " *Miller v. Civil City of South Bend*, slip op. at 11-12 (footnote omitted) (holding that nude dancing is protected speech). The concurrences in that case openly acknowledge the prurient appeal of nude dancing in their accounts of the "expression" implicit in such dancing. One judge writes:

> It seems to me beyond doubt that a barroom striptease is "expressive." Even if relatively

[9] *See generally* the majority opinion and two concurrences in the highly divided Seventh Circuit en banc case, *Miller v. Civil City of South Bend*, No. 88-3006/3244 (7th Cir., May 24, 1990).

> restrained, as are the videos in evidence here, a striptease sends an unadorned message to a male audience. It is message of temptation and allurement coupled with coy hints at satisfaction. In a real barroom, messages would probably also flow in the opposite direction, in the form of encouraging comments to the performer from the patrons. *E.g.* "Take it off; take it off!"

Miller, slip op. at 16-17 & n.1 (Cudahy, J., concurring). The other concurrence in that case goes beyond flirtation with the obscenity standard by describing the message sent by barroom dancing girls as being explicitly grounded in prurience:

> Erotic dances express erotic emotions, such as sexual excitement and longing. Nudity is the usual state in which sexual intercourse is conducted in our culture, and disrobing is preliminary to nudity. But of course nudity and disrobing are not invariably associated with sex. The goal of the striptease – a goal to which the dancing is indispensable – is to enforce the association: to make plain that the performer is not removing her clothes because she is about to take a bath or change into another set of clothes or undergo a medical examination; to insinuate that she is removing them because she is preparing for, thinking about, and desiring sex. The dance ends when the preparations are complete. The sequel is left to the viewer's imagination. This is the "tease" in "striptease."
>
> * * *
>
> Of course, there would be no female stripteases without a prurient interest in the female body . . . .

Miller, slip op. at 21 (Posner, J., concurring). If the message communicated by such barroom dancers is primarily

one of prurience, that communication is not entitled to First Amendment protection.

A peril even more difficult of circumnavigation than the potentially unprotected status of the message being communicated by Walker's "go-go" girls in the Supreme Court's recent holding that ballroom dancing does not constitute protected expression. In *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), the owner of a ballroom dance hall charged that a local ordinance limiting the use of dance halls to teenagers between the ages of fourteen and eighteen violated his patrons' "right of association." The Court described the two separate routes to protected freedom of association as entailing either an association involving "certain intimate human relationships" or an association formed "for the purpose of engaging in those activities protected by the First Amendment." 109 S. Ct. at 1594 (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18 (1984)). After rejecting the first of these as a plausible characterization of ballroom dancing,[10] the Court went on to consider whether the ballroom dancers "were engaged in a form of expressive activity . . . protected by the First Amendment." 109 S. Ct. at 1595. Expressive activity of the sort that activates First Amendment protections, the Court held, ballroom dancing is not. Importantly, however, the Court did find that ballroom dancing was "associational," holding only that that association was simply not expressive. 109 S. Ct. at 1595.

---

[10] *Stanglin*, 109 S. Ct. at 1985 ("It is clear beyond cavil that dance-hall patrons . . . are not engaged in the sort of 'intimate human relationships' [protected by the freedom of association].")

The right of expressive association has been considered a necessary adjunct to the rights secured by the First amendment:

> An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed. . . . Consequently, we have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.

Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984) (citations omitted). Because the right of expressive association is derived from those rights mentioned in the First Amendment, all that need be shown to establish the existence of such a right is, first, that a group of people have come together, and, second, that they have come together for the purpose of engaging in some activity protected by the First Amendment:

> What the Court *has* recognized as implicit in the first amendment, and therefore in the liberty secured by the fourteenth, is *a right to join with others to pursue goals independently protected by the first amendment*. . . .
>
> [Our constitution] has at least protected the concerted pursuit of ends that would represent fundamental rights *in the context of purely individual activity*.

L. Tribe, American Constitutional Law 702-03 (1978) (emphasis added to second sentence). Assuming an association is found, therefore, any activity that would merit

First Amendment protection if engaged in outside the context of the association will suffice to constitute a right of association.[11]

In *Stanglin* the Court did find that the activities at the dance-hall were associational "in common parlance" but found that they were not expressive – "they simply do not involve the sort of expressive association that the First Amendment has been held to protect." 109 S. Ct. at 1595. Thus, although the respondent in *Stanglin* fashioned his argument as a right of association claim, the Court's statement that "this activity [does not] qualif[y] . . . as a form of 'expressive association,' " 109 S. Ct. at 1595, combined with the Court's finding that ballroom dancing in respondent's dance-hall was associational, establishes that ballroom dancing by itself is not protected speech.

While the precise sort of dancing at issue in *Stanglin* was ballroom rather than "go-go" dancing, it turns the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes. *See, e.g., Young v. American Mini Theatres*, 427 U.S. 50, 61 (1976) ("[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic

---

[11] Of course, the right of association is no more absolute than the right of free speech or any other right; consequently there may be countervailing principles that prevail over the right of association. *Compare United States v. O'Brien*, 391 U.S. 367, 377 (1968), *with Roberts*, 468 U.S. at 623.

expression . . . . "). Indeed, as Judge Easterbrook has noted:

> A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little virtue other than avoiding inconvenient precedent such as *Stanglin*. If the "expression" in barroom dancing lies, as my colleagues believe, slip op. at 11-12, in a celebration of sex, conveying the pleasure dancers take in sensuality, social dancing is the more expressive. Barroom dancers feign emotion; ballroom dancers express the real thing. So if precedent is what drives our court today, the most powerful case is *Stanglin*, which undermines the majority's conclusion [that barroom dancing is protected speech].

Miller v. Civil City of South Bend, slip op. at 96 (Easterbrook, J., dissenting).

Whether *Stanglin* preempts our consideration of the First Amendment status of "go-go" girls, and whether the gyrations of "go-go" girls at the Last Chance Lounge can be described as an appeal to either the intellect or those emotions not grounded in prurience, *see generally Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989) (noting the capacity of music to "appeal to the intellect and to the emotions," in holding that music "as a form of expression and communication" is protected speech), we do not decide today. Walker has suggested no theory under which we could find his go-go girls expressive of something protected by the First Amendment. Rather he states simply that "it has been held by the United States Supreme Court that nude dancing is entitled to some First Amendment protection." Appellant's Brief at 29. As we have noted above – and members of the Supreme

Court have noted in *Young v. Arkansas*, 474 U.S. at 1072, and *Bellanca*, 452 U.S. at 718-19 – the Supreme Court has held no such thing. We raise the specter of an obscenity determination and of the *Stanglin* precedent only to point out some of the land mines that await proponents of the view that go-go girls communicate constitutionally protected expression.[12]

---

[12] The dissent correctly points out that our comments on the doubtful standing of go-go dancing as First Amendment speech are dicta. In addition, the dissent asserts that they are "clearly wrong." We note only that the dissent's argument rests *exclusively* on dicta from *Schad*. It would seem that the three reasons offered by the dissent for finding our discussion of the First Amendment status of nude dancing "clearly wrong" are merely three restatements of a general argument that the dicta in *Schad* should be controlling. Indeed, the lower court cases cited in the dissent for the proposition that nude dancing is protected speech all rely on the dicta in *Schad*. We also note that, contrary to the view expressed in the dissent, the First Amendment status of Walker's go-go girls is properly before us in this case. The Kansas City ordinance was struck down by the District Court on only one ground: Walker's putative right under the First Amendment to display go-go girls. The city cross-appeals that determination. That the city relied only on its authority under the police power to zone businesses dealing in "adult" material – some of which may or may not be entitled to First Amendment protection – does not constitute an abandonment of the First Amendment issue. We do not rest our decision in this case on the First Amendment because we do not need to: the Twenty-first Amendment compels the result, thus preempting the First Amendment issue. Finally, we categorically reject the suggestion in footnote 6 of the dissent that our view of the applicability of the First Amendment turns on "a personal distaste for Walker's go-go dancing." *Post* at 36 n.6. This is simply not true. While no judicial opinion can hope to

(Continued on following page)

III.

Although we do not decide the question whether the Founding Fathers had "exotic dancing" in mind when they penned the First amendment, our decision need not rest on a holding that go-go dancing is not protected speech, for Walker intended to establish such dancing in a bar. This zoning ordinance "come[s] to us, not in the context of censoring a dramatic performance in a theater," but rather in a context of regulating the activities that may be conducted at the Last Chance Lounge, a bar licensed to sell liquor by the drink.[13] *California v. Larue*, 409 U.S. 109, 114 (1972).

(Continued from previous page)

be value free, nor should it be, we think the pertinent values are those found in the text of the First Amendment, and it is by those values (as well as by the relevant decisions of the Supreme Court) that our discussion of this issue has been guided.

[13] From the inception of this litigation Walker has claimed that the zoning ordinance violates the First Amendment only as the ordinance applies to him. Whether the ordinance could be construed to violate the First Amendment rights of anyone else – prospective proprietors of "go-go" dance facilities that are not licensed to dispense liquor by the drink, for example – therefore is not before us. Nonetheless, we cannot help observing that the great leeway the Supreme Court has accorded local governments in their attempts to deal with the secondary effects of so called "adult" establishments suffices to shield this ordinance from a facial attack in any event. In *City of Renton v. Playtime Theaters*, the Supreme Court stated, "[A] majority of this Court decided that, at least with respect to businesses that purvey sexually explicit materials, zoning ordinances designed to combat the undesirable secondary effects of

(Continued on following page)

States have authority under the Twenty-first Amendment to impose an almost limitless variety of restrictions on drinking establishments such as the Last Chance Lounge.[14]

(Continued from previous page)

such businesses are to be reviewed under the standards applicable to 'content-neutral' time, place and manner regulations." 475 U.S. 41, 49 (1986) (footnote omitted). After finding that the zoning restrictions placed on "adult" theaters in that case concerned "vital governmental interests," 475 U.S. at 50, the Court stated that "[c]ities may regulate adult theaters by dispersing them, as in Detroit, or by effectively concentrating them, as in Renton. . . . '[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.' " 475 U.S. at 52 (quoting *Young v. American Mini Theaters*, 427 U.S. 50, 71 (1976) (plurality opinion)). Even if we were to assume that some of the activities encompassed by the District C-X classification in the Kansas City zoning ordinance were entitled to some First Amendment protection, the ordinance is surely within the range of solutions we must give the city "a reasonable opportunity to experiment with."

[14] To the extent that its laws do not conflict with those of the state of Missouri, Kansas City possesses all the powers that the state has the authority to confer. *See* Mo. Const. art. VI, § 19(a); Kansas City, Mo., Charter § 1 (1986). "[The] state Liquor Control Act [of Missouri] does not attempt to preclusively regulate but, on the contrary, specifically authorizes municipalities to enact ordinances, consistent with the state law, regulating wholesalers and retailers of alcoholic beverages." *Passler v. Johnson*, 304 S.W.2d 903, 907 (Mo. 1957), And, in fact, the Kansas City Charter authorizes the city "[t]o restrain, regulate or prohibit the manufacture, sale or giving away of any wines, intoxicating or malt liquors." Kansas City, Mo., Charter § 1(51). *See generally Chestnut Inn v. Johnson*, 297 S.W.2d 576 (Mo. Ct. App. 1957) (sustaining order of Kansas City Liquor Control Board of Review, which suspended city

(Continued on following page)

> The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, 445 U.S. 97, 110 (1980). Faced with "concrete case[s]" remarkably similar to the present one, the Supreme Court has deferred to the State's power to regulate.

Thus, for example, in *California v. LaRue*, the Court sustained California liquor regulations that prohibited, among other things, the exposure of any portion of a person's genitals or anus, whether live or depicted in films or pictures, in any establishment licensed to sell liquor by the drink. 409 U.S. 109, 111-12, 118-19 (1972). Although the California regulations concerned slightly more explicit displays of human body parts than those

---

(Continued from previous page)

permit to sell alcoholic beverages for ten days due to gambling on premises where alcohol was sold, in violation of city ordinance).

It is irrelevant that we deal here with the Plans and Zoning Committee of the City Council and with the Council itself rather than, say, a Liquor Licensing Board. It is the City Council that has the power to ban "exotic dancing" in bars, and the particular procedural devices or types of committees the Council employs to deal with such activities are of no constitutional significance.

that call the Kansas City zoning ordinance into play[15] – go-go girls in Kansas City must at least cover their genitals and areolas – the *LaRue* Court's reasoning extends well beyond the facts of that case. The Court explained:

> While the States, vested as they are with general police power, require no specific grant of authority in the Federal Constitution to legislate with respect to matters traditionally within the scope of the police power, the broad sweep of the Twenty-first Amendment has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

409 U.S. at 114.

Some years later the Court upheld, in a *per curiam* opinion, a state law that prohibited not only the display of human genitals and anuses but also the display of any portion of a female breast below the areola in establishments where alcohol was consumed on the premises. *New York State Liquor Auth. v. Bellanca*, 452 U.S. 714, 714 n.1, 715 (1981). Again, the Court relied on the state's regulatory dominion over the sale of alcohol: "The State's power to ban the sale of alcoholic beverages entirely includes the lesser power to ban the sale of liquor on premises where topless dancing occurs." 452 U.S. at 717.

These cases make clear that Kansas City could have altogether forbidden any number of activities from taking place in the Last Chance Lounge,[16] not the least of which

---

[15] It is also true, however, that the Kansas City ordinance only applies to live acts.

[16] *See, e.g., Chestnut Inn v. Johnson*, 297 S.W.2d 576 (Mo. Ct. App. 1957).

is "exotic dancing" as defined in section 39.156 of the zoning ordinance. And as the greater power to ban the sale of alcoholic beverages includes the lesser power to regulate their sale, the greater power to totally prohibit exotic dancing in bars includes the lesser power to consider permitting such dancing in bars on a case-by-case basis.

Walker simply has no First Amendment right to display "go-go girls" in a drinking facility. His First Amendment rights cannot, therefore, have been violated by this zoning ordinance, and we thus reverse the decision of the District Court in favor of Walker on his First Amendment claim.[17]

---

[17] The dissent argues that we are without authority to consider the State's power under the Twenty-first Amendment in this case because the city has relied on its authority to zone rather than its authority to regulate drinking establishments. In our view, however, to ignore the city's clear authority to prohibit exotic dancing in bars under the *Larue* line of cases would be on the order of rejecting a search and seizure claim on grounds of reasonableness in a case in which the perpetrator was not a state actor. That the city presented us with a brief that could fairly be described as less than stellar and inexplicably ignored the *Larue*, *Bellanca*, and *Iacobucci* cases does not relieve us of responsibility to announce the law, particularly where the issue itself – if not the dispositive case law – was, in fact, raised before the District Court and argued on appeal.

As this Circuit stated less than two years ago, "we have a responsibility to conform our decision to the law as we see it." *Pfoutz v. State Farm Mut. Auto, Ins. Co.*, 861 F.2d 527, 530 n.3 (1988). In that case "the district court made no reference to Mo. Stat. § 307.010 and the parties did not raise the statutory provision prior to oral argument [where it was raised by the

(Continued on following page)

The dissent, *post* at 35-36, suggests that our decision smacks of "judicial legislation." In our view, we would be guilty of "judicial legislation" if we were to uphold the District Court's First Amendment ruling striking down the challenged zoning ordinance when there has not been a clear showing of a constitutional violation. Here, we do just the opposite: we refuse to strike down the ordinance because it is apparent that what the city has done is well within the safe harbor afforded by the Twenty-first

---

(Continued from previous page)

panel]" but the Court stated that nevertheless "we rely on [that] statute." Our rationale for deciding that case on the basis of a statute cited by neither of the parties applies equally to the case before us today: "Our reliance on the Missouri motor vehicle statute raises no new issue in this case, but rather *suggests another theory to use in resolving the issues raised by the parties.*" *Id.* (emphasis added). We also stressed that the new theory injected into the case by the Court was, as here, of a legal rather than factual nature. *Id.* In our view, to ignore the Supreme Court's decisions in the *Larue* line of cases in the present case would amount to a denial of our responsibility to conform our decision to the law.

Moreover, to give such a narrow interpretation to the issues preserved for review in this case as to exclude discussion of the Twenty-first Amendment would be a great injustice to the people of Kansas City. Assuming the city would not prevail under the cases cited in its brief, we would be punishing the people of Kansas City because their attorneys failed to push the right buttons in a highly complex and shifting area of the law. Courts, including if not especially the Supreme Court, have decided cases on the basis of issues not raised in many contexts, but have been particularly prone to do so in this area of the law. *See FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 624 (1990) (Scalia, concurring in part, dissenting in part) (citations omitted); *see generally Singleton v. Wulff*, 428 U.S. 106, 121 (1975).

Amendment. In refusing to allow the city and its taxpayers to be held liable for a non-existent constitutional violation, we believe we are applying the law rather than creating it and are adhering to the proper role of the judiciary in our country's system of government. As the city has not committed any violation of the Constitution, the relevant views as to the merits of coupling go-go dancing with the serving of alcohol in a public bar are not those of the judges on this particular panel, but those of the people of Kansas City as expressed through their chosen representatives – and, which were, incidentally, also expressed in this case by the people of the affected neighborhood themselves, with some fervor and regularity during the hearings on Walker's application. The view of the people of Kansas City, as reflected in the Council's action on Walker's application, is that Walker should not be permitted to display go-go girls in his bar, and we hold that the Constitution does not require otherwise.

IV.

A.

Walker also claims that defendants violated his rights to both procedural and substantive due process in the treatment of his application of rezoning. Procedural due process is based on the words of the Due Process Clause of the Fourteenth Amendment: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." Walker therefore must assert a life, liberty, or property interest in obtaining the Council's permission to display go-go girls at the Last Chance

Lounge. The source of "substantive due process" is somewhat more obscure, and the legitimacy of the doctrine has been long debated. *E.g.*, *Bowers v. Hardwick*, 478 U.S. 186 (1986); *Griswold v. Connecticut*, 381 U.S. 479, 508-10 (1965) (Black, J., dissenting); *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 620-26 (1857) (Curtis, J., dissenting). Unlike its eponym, substantive due process refers not to process at all, but to substantive rights. To make out a substantive due process claim, Walker must show that the law violated one of his fundamental rights, which no amount of process could repair. We say this not to be gratuitously pedagogic, but because it is not entirely clear which due process arguments Walker made in the District Court and consequently which arguments are properly before us for review.

In his memorandum in support of his motion for a preliminary injunction and his application for a temporary restraining order, Walker stated that he was making a procedural due process claim based on a liberty interest in displaying go-go girls at the Last Chance Lounge. His description of the state action as "the City Council's enactment of Zoning Ordinance Section 39.156,"[18] however, makes sense only as part of a substantive due process claim. The District Court described Walker's claim as resting on a property-based procedural due process right, but employed substantive due process cases in its analysis. On appeal, Walker asserts a procedural due process right grounded on a liberty interest as well is a substantive due process right. If a recitation of the due process

---

[18] Plaintiff's Memorandum in Support at 18.

arguments that have been raised and discussed thus far in this case were a statute it would be void for vagueness.

While we are loath to review a claim that appears not to have been preserved for appeal, it is unclear to us which claims have and which have not been so preserved. And in this case we are even more loath to fashion a procedural bar to a review of the merits for fear of inducing yet more litigation of this matter. Moreover, unlike any decision we may make regarding which of the various due process claims have, in fact, been preserved for review, the merits of the case are clear: under no theory of either procedural or substantive due process is Walker entitled to relief. We will consider in turn each due process claim arguably raised in the proceedings below.

Assuming Walker adequately pleaded a procedural due process right grounded in both liberty and property interests, as well as a substantive due process right to display go-go girls at his bar, his claim fails. The strongest of his due process theories is that which the District Court supposed him to have made, and which the court properly rejected: a procedural due process right based on a property interest in having the City Council approve his application for rezoning.

Before due process protections will attach, Walker "clearly must have more than an abstract need or desire for [receiving the benefit]. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Nothing in the Kansas City

ordinance entitled Walker to believe that the City Council would – much less must – approve his application.

The zoning ordinance establishes various hoops an applicant for C-X zoning must jump through to be minimally eligible for the zoning change, but leaves entirely to the discretion of the City Council the determination to grant or deny the proposed rezoning. The only guidepost available to the City Council in making this decision is found in the opening statement of the "Purpose" section of the zoning ordinance, which reads: "In the interpretation and application of the provisions of this Chapter, such provisions shall be held to be the minimum requirements adopted for the promotion of the health, safety, morals, or the general welfare of the community." Kansas City, Mo., Zoning Ordinance § 39.340 (1987). Taking this statement to be more precept than shibboleth, it still places loose reins on the Council's discretion – far loser reins than even those state regulations that the Supreme Court has held to lack the requisite "substantive limitations" necessary to call the Due Process Clause into play. "[R]egulations [that] place no substantive limitations on official discretion . . . create no . . . interest entitled to protection under the Due Process Clause." *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983). An evaluation of whether granting a particular rezoning application request would advance, for example, "the general welfare of the community" is, at its most concrete, "subtle and depend[ant] on an amalgam of elements, some of which are factual but many of which are purely subjective appraisals." *Greenholtz v. Nebraska Penal Inmates*, 442 U.S.

1, 9-10 (1979).[19] And there are absolutely no standards, guidelines, or procedures to aid the Council in deciding whether to grant an application for C-X zoning.[20]

Precisely because the zoning ordinance "place[s] no substantive limitations on official discretion," *Olim*, 461 U.S. at 249, it does not obligate the City Council, as a constitutional matter, to afford Walker any particular process: nothing could be shown that would compel the City Council to grant an application for C-X zoning. If the zoning ordinance so limited the discretion of the City Council that a constitutionally protected property interest were created, then holding hearings ad infinitum without ever calling Walker's application to a vote might violate the due process requirement that the hearing be held "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). But the ordinance, far from so limiting the Council, leaves it with unfettered discretion. Although the ordinance provides for a hearing on applications for C-X zoning, there can be

---

[19] Although both *Greenholtz* and *Olim* concerned liberty rather than property interests, the Court has not distinguished between these interests in applying the principle that certain degree of discretion in the hands of the decisionmaker must defeat claims to due process. *See, e.g., Board of Pardons v. Allen*, 482 U.S. 369, 381-85 (1987) (O'Connor, J., dissenting); *United States v. Von Neumann*, 474 U.S. 242, 252 (1986) (Burger, C.J., concurring in part); *Bishop v. Wood*, 426 U.S. 341, 356 n.1 (1976) (White, J., dissenting); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972); *Board of Regents v. Roth*, 408 U.S. 564, 578 (1972).

[20] *Cf. Connecticut Bd. of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981) ("The . . . statute, having no definitions, no criteria, and no mandated 'shalls,' creates no analogous duty or constitutional entitlement.").

no due process right to an expeditious disposition of the subject matter of a hearing that is held as a matter of grace, rather than as a matter of constitutional requirement. It is the very discretion Walker complains of that defeats his due process claim based on an asserted property interest in C-X zoning. We therefore affirm the District Court's rejection of this claim.

Walker's other procedural due process claim – that he had a "liberty" interest in establishing go-go girls at the Last Chance Lounge – also lacks merit. Walker contends that because his desire to display almost-nude dancing girls in his bar constituted an attempt to exercise his constitutionally protected right of free speech, any limitation Kansas City placed on his ability to so proceed encroached on his liberty, thereby calling the Due Process Clause into play. We disagree. This sort of peep-show entertainment would not rise to the level of a liberty interest when presented in a drinking establishment even if we accepted Walker's interpretation of the First Amendment. For the reasons stated in Part III of this opinion, Walker's conception of the constitutional status of go-go girls runs headlong into the state's power under the Twenty-first Amendment to trump Walker's hypothetical First Amendment rights. Kansas City would have acted within constitutional bounds had it banned go-go dancing outright in establishments licensed to sell liquor by the drink. Walker, therefore, has no protected liberty interest in gaining permission to display go-go girls at the Last Chance Lounge and he was due no constitutionally mandated process in the City Council's consideration of his application.

Nor does Walker's interest in go-go girls attain the rank of a "substantive due process right." Although "emanations" from the "penumbras" of the Bill of Rights have been found to protect an expansive array of activities not obvious to the casual reader of the Constitution,[21] we can find no "emanation" that would encompass the right to have go-go girls perform in one's bar. The "substantive due process" mantra (or some variation on the theme of constitutional rights that do not owe their existence to any particular language in the text of the Constitution) has been invoked to shelter fundamental individual rights from governmental interference in the areas of child rearing and education,[22] family relationships,[23] procreation,[24] and marriage.[25] It is difficult to

---

[21] *See Griswold v. Connecticut*, 381 U.S. 479, 484 (1965).

[22] *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (finding compulsory public education for children an encroachment on the fundamental right of parents to direct the education of their children); *Meyer v. Nebraska*, 262 U.S. 390 (1923) (state statute prohibiting the teaching of any modern language except English in elementary schools violates same fundamental right).

[23] *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) (right to live with one's grandmother violated by city housing ordinance limiting residents of single dwelling unit to members of immediate family); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (recognizing a right in the parent or guardian of a child to control the child's religious education).

[24] *Roe v. Wade*, 410 U.S. 113 (1973) (holding that a woman has a right to abort her fetus in some circumstances); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (state law forbidding the sale of contraceptives to married couples violates the right to marital privacy).

[25] *Loving v. Virginia*, 388 U.S. 1 (1967) (holding anti-miscegenation laws a violation of the Due Process Clause).

imagine an interest more directly at antipodes from these interests than that asserted by Walker in this case.[26] Indeed, the "teachings of history" and the "basic values . . . under[lying] or society" that have informed the Court's discovery of "substantive due process" rights[27] militate rather strongly against a fundamental right to promote the entertainment envisioned by Walker.[28]

To examine the most expansive expositions on the idea that the Due Process Clause protects fundamental freedoms that are not specified in the Constitution is to demonstrate forcefully that no "substantive due process" right is to be found in the display of go-go girls in a bar.

> [T]hrough the course of this Court's decisions [due process] has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society. . . . The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke.

---

[26] *Cf. Bowers v. Hardwick*, 478 U.S. 186 (1986).

[27] *Griswold*, 381 U.S. at 501 (Harlan, J., concurring).

[28] *Cf.* Model Penal Code § 213.5 comment.

> Exposure of one's private parts to public view constituted a common-law misdemeanor. . . . The proscribed conduct [in modern state statutes] usually focuses upon exposure of one's private or intimate parts, although a number of recent revisions more narrowly prohibit display of a "sex organ" or of other specifically named areas of the body.

Id. at 406 & 409 (footnotes omitted).

Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

> [Liberty] denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.

Meyer v. Nebraska, 262 U.S. 390, 399 (1923). Walker's desire to engage go-go girls at the Last Chance Lounge is not one of "those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men."[29] It therefore is not protected by substantive due process.

---

[29] Faced with a claim similar to Walker's, the Supreme Court has written:

> Our prior decisions recognizing a right to privacy guaranteed by the Fourteenth Amendment included "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty.' . . . "
>
> Nothing, however, in this Court's decisions intimates that there is any "fundamental" privacy right "implicit in the concept of ordered liberty" to watch obscene movies in places of public accommodation.

Paris Adult Theater I v. Slaton, 413 U.S. 49 at 65-66 (1972) (citations omitted).

V.

We hold that the Kansas City zoning ordinance challenged here is well within constitutional bounds. Because of the state's broad powers under the Twenty-first Amendment, Walker's First Amendment right to display go-go dancers in his bar, assuming *arguendo* the existence of such a right, has not been violated. We therefore reverse the District Court's judgment for Walker on his First Amendment claim. The District Court's injunction against the application of the ordinance to Walker and its award of nominal damages and attorney fees are, therefore, vacated. Our reversal of the judgment for Walker on his First Amendment claim moots his claim for compensatory damages and makes it unnecessary for us to reach the issues raised by Walker concerning the District Court's denial of compensatory damages. In all other respects, the challenged rulings of the District Court, including its rejection of Walker's due process claims, are affirmed.

Affirmed in part and reversed in part.

DUMBAULD, Senior District Judge, concurring.

Since the panel is unable to join in a unanimous opinion, it may be helpful if I state my own views respecting how I regard the issues involved.

The case at bar is essentially a zoning or land use case. Appellant seeks to change the existing use at the location of his establishment from a bar *simpliciter*, selling liquor by the glass for consumption on the premises, to an establishment so selling liquor *plus* providing go-go dancing. This automatically thereupon becomes a case

subject to regulation by the city's zoning authority under its broader powers conferred by the Twenty-first Amendment.

That is true whether counsel talks about the Twenty-first Amendment or not. Naturally he will talk more about the new feature being added (just as a car salesman will stress the new anti-locking brakes rather than the time-tested rugged engine) but, *ex necessitate rei* the force of the Twenty-first Amendment necessarily comes into the picture.

I am satisfied that, as stated above, the facts of the case automatically invoke application of the Twenty-first Amendment. As the old maxim says, the law arises from the facts – *ex facto oritur jus*.

The facts of the case show that the setting and environment involve not the abstract issue whether dancing is speech, but whether in a barroom setting the City possesses broadened[1] regulatory authority to act against the evils consequent upon such a situation. These are substantial evils, arising from the synergistic impact of nudity and liquor together. They are colorfully described by Chief Judge Rehnquist in his opinion for the Court in *Larue*.[2]

---

[1] It was pointed out in *California v. Larue*, 409 U.S. 109, 114 (1972), that "the broad sweep of the Twenty-First Amendment has been recognized as conferring something more than the normal state authority over public health, welfare and morals [traditionally within the scope of the police power]."

[2] 409 U.S. at 111.

This case on its plain facts involves not a ballet in a theatre but in the context of a barroom environment with interaction between the dancers and customers,[3] and the City does have adequate regulatory power under *Larue* and also under *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 715 (1986).[4] These authorities are adequate, in my view, to support our decision.

Hence, in the case at bar I think we cannot escape the force of an Amendment to the Constitution. It is a part of the Supreme Law and we must apply it. So I am agreeable to relying on the Twenty-first Amendment as our *ratio decidendi*.[5]

Judge Bowman's opinion, as I interpret it, firmly rests the decision on these authorities. He also in note 13 cites the cases permitting zoning (either by concentration or dispersion) of "adult" entertainment as a proper method of allocating lands use. The Supreme Court thus recognized First Amendment concerns as not necessarily controlling but simply one peripheral element to be considered in the balancing decisions regarding the appropriate use of a particular tract.

---

[3] *See* 409 U.S. at 114.

[4] It is well established "that a State has broad powers under the Twenty-first Amendment to regulate the times, places *and circumstances* under which liquor may be sold." [Italics supplied].

[5] *See also Singleton v. Wulff*, 428 U.S. 106, 121 (1976); and *FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 624 (Scalia, J).

I therefore concur in Part III of his opinion,[6] and in the judgment of reversal in part, and affirmance in part.

LAY, Chief Judge, dissenting.

I respectfully dissent. In my view, the majority improperly reaches issues not raised by the parties, and then erroneously resolves those issues.

The only issue raised by the City on cross-appeal is whether the district court applied the proper standard of review to the City Council's actions. The City did not, in either the district court or in this court, challenge the first amendment status of Walker's proposed entertainment.[1] The primary difficulty I have with the majority's opinion is that it fails to decide the issues before us and then

---

[6] With respect, I regard part II as massive *obiter dictum*, or in his own pithy phrase "gratuitously pedagogic." To a lesser degree, the same is true of part IV. I view the invocation of due process by appellant as merely a vehicle for making the First Amendment applicable to local governments under the doctrine of "selective incorporation." No substantial claim is presented of delay amounting to denial of justice in the sense of article 40 of Magna Carta. *See* J. C. Holt, *Magna Carta* (1965) 326-27.

[1] To the contrary, before this court, the City appears to concede the first amendment status of Walker's proposed entertainment: "The City Council is not required to suspend its role in land use planning while considering a proposal to rezone an area adjacent to an extensively used park *even though the proposal involves expression that is protected by the First Amendment.*" Appellee's Br. p.40 (emphasis added); *see also id.* p.36 ("constitutionally protected form of expression"). This concession is arguably an even stronger justification for not reaching the first amendment issue than is the failure to raise the issue.

reaches out to decide issues that were not briefed or argued to this court. The opinion in Section II discusses in ten pages why the Kansas City ordinance as applied to go-go dancing should not deserve first amendment protection. It concludes, however, that it is not necessary to decide the case on this basis because the City was within its authority to deny Walker's application under the 21st amendment.[2] Not only is the discussion on the first amendment advisory and pure dicta, it is also clearly wrong.

First, the majority relies on dicta from the Supreme Court to suggest that nude dancing is not protected by the first amendment. I suggest this dicta is no more persuasive than the Supreme Court's statement in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981), which the majority dismisses as "unadulterated dicta." Second, I believe the *Schad* dicta is stronger and more persuasive than the majority recognizes. The Court began its analysis in *Schad* by noting: "Here the Borough totally excludes all live entertainment, *including non-obscene nude dancing that is otherwise protected by the First Amendment.*" 452 U.S. at 68 (emphasis added). Third, *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), does not apply to this case since it is not a free speech case, but a freedom of association claim. Finally, no other circuit court of which I am aware has

---

[2] I find surprising the majority's reasoning for not reaching the first amendment issue: "Walker has suggested no theory under which we could find his go-go girls expressive of something protected by the first amendment." Maj. op. at 17. Walker logically suggested no "theory" since he assumed, as did the City, that the first amendment status of the proposed entertainment was not at issue.

deprived entertainment businesses of first amendment protection for dancing.[3] The en banc Seventh Circuit has recently passed on this issue, and until there is authority to the contrary, it seems to me the Seventh Circuit's opinion should be followed. *See Miller v. Civil City of South Bend*, No. 88-3006/3244 (7th Cir. May 24, 1990).

However, my judicial concern relates to the majority's holding that the land use ordinance, which the district court found unconstitutional under rules of prior restraint, may be upheld under the 21st amendment.[4] This will be startling news to the City as well as to Walker since this issue was never raised before the City Council, or factually discussed by Council members, or asserted in the district court, or briefed or argued by the parties in this court. The records of the City Council proceedings do not contain one word or reference to liquor regulation or the authority of the City to deny Walker's permit because the proposed entertainment was to take place in a facility serving liquor. The City Council's failure to consider this authority is not surprising because this case does not

---

[3] *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104, 1107 (9th Cir. 1986) (recognizing first amendment status of barroom nude dancing); *International Food & Beverage Sys. v. City of Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986) (same); *Leverett v. City of Pinellas Park*, 775 F.2d 1536, 1540 (11th Cir. 1985) (same).

[4] The 21st amendment reserves for the states the authority to regulate "[t]he transportation or importation into any state * * * for delivery or use * * * intoxicating liquors." U.S. Const., amend. 21.

relate to the regulation of liquor, but is a zoning case relating to land use.[5]

---

[5] Even if I could agree that this issue was properly raised for our consideration, I have doubts about the majority's resolution of the issue. I recognize that states possess authority to regulate liquor sales and distribution. *See, e.g., New York Liquor Auth. v. Bellanca*, 452 U.S. 714 (1981); *California v. LaRue*, 409 U.S. 109 (1972). The majority's application of the 21st amendment in this case, however, when the City is not even attempting to regulate liquor, expands the 21st amendment far beyond the scope of the authority that the Supreme Court has recognized. I therefore find the majority's representation that this case is "remarkably similar" to the Supreme Court's precedents on this subject, maj. op. at 18, unbelievable. Cases such as *Bellanca*, *LaRue*, and *Lanier v. City of Newton, Ala.*, 842 F.2d 253 (11th Cir. 1988) illustrate the context in which 21st Amendment authority should be upheld: Where the regulatory authority finds that the combination of liquor and certain forms of entertainment leads to conduct deemed undesirable. *See Belanca*, 452 U.S. at 718 (city chooses to avoid disturbances associated with mixing alcohol and nude entertainment); *LaRue*, 409 U.S. at 111 (evidence established incidents of prostitution, rape, and assault occurring in or near bars offering nude entertainment); *Lanier*, 842 F.2d at 255 (town council found nudity and alcohol led to undesirable behavior). The City Council in this case was not even remotely concerned with regulating liquor. In this context, I find persuasive the reasoning of *Southern Entertainment Co. of Fla., Inc. v. City of Boynton Beach*, 736 F. Supp. 1094 (S.D. Fla. 1990), in which the court pointed out the 21st amendment is applicable only where the sale of liquor in conjunction with nudity is regulated rather than simply regulating the nudity. Here, the City Council did not express any attempt to regulate liquor, or identify any possible alleged evils associated with the combination of liquor and nudity. The City Council's action was simply a reaction to the proposed nudity. Although the Supreme Court has not adopted this reasoning, it has recognized that the states' 21st amendment authority is not without limits. *See, e.g.; City of Newport, Ky. v. Iacobucci*, 479 U.S. 92, 94-95 (1986); *id.* at n.5.

It is popular these days to urge that appointed judges should not engage in "judicial legislation." I am not sure what that phrase means but it has always been popular to assert that judges should not make the law, but should simply interpret it. This aphorism overlooks the very nature of judicial work in that when judges decide cases they do make law. I assume that those who urge that judges should not legislate really mean that judges should not engage in policymaking decisions as legislatures and city councils have the power to do or inject their own personal views as legal doctrine.[6] The criticism directed towards judges legislating is seldom justified as it overlooks five fundamental differences between judicial review and legislation.

First, judges are required to review cases only under the grant of authority provided by the Constitution or legislation. Second, judges do not decide hypothetical or advisory cases, but must confine themselves to actual or

---

[6] The majority, in its dicta discussion of the first amendment, portrays a personal distaste for Walker's proposed go-go dancing. This calls to mind the following verse:

His good has no nuances. He
Doubts or believes with total passion.
Heretics choose for heresy
Whatever's the prevailing fashion.
Those wearing tolerance for a label
Call other views intolerable.

Phyllis McGinley, *In Praise of Diversity* (reprinted in Kuh, Foolish Figleaves? Pornography in – and out of – Court at 175 (1967); *see also Miller*, No. 88-3006/3244 (Posner, J., concurring) (giving first amendment protection to nude dancing strikes judges as ridiculous due in part to personal beliefs.)

real controversies between parties who have standing or an interest in the litigation. Third, judges are confined to the factual record before them. Fourth, on appeal, judges will review only those issues that are decided in the district court and that are briefed and argued on appeal. Fifth, the very essence of judicial duty is to avoid deciding constitutional questions unless absolutely necessary.

I respectfully submit that the majority opinion offends these basic canons governing judicial review. I therefore dissent.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
FILED
JUL 31
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA; LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA; CIVIL CITY OF SOUTH BEND; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

vs.

GLEN THEATRE, INC., *et al.* and DARLENE MILLER, *et al.,*

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF AMICUS CURIAE OF AMERICAN FAMILY ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

PEGGY M. COLEMAN
P.O. Drawer 2440
107 Parkgate Drive
Tupelo, Mississippi 38803
(601) 844-5036

Counsel of Record
For Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
LAW AND ARGUMENT	
I. THE SUPREME COURT HAS TRADITIONALLY AFFORDED NUDE DANCING MINIMAL CONSTITUTIONAL PROTECTION	5
II. THE SEVENTH CIRCUIT'S PROTECTION OF NUDE DANCING CONTRADICTS PRECEDENT AND BRINGS NUDE DANCING WITHIN THE FULL AMBIT OF THE FIRST AMENDMENT	12
CONCLUSION	20
CERTIFICATE OF SERVICE	21

TABLE OF AUTHORITIES

CASES	Page
California v LaRue, 409 U.S. 109 (1972)	5,6
Cohen v California, 403 U.S. 15 (1971)	18,19
Doran v Salem Inn, 422 U.S. 922 (1974)	6
Erznoznik v Jacksonville, 422 U.S. 705 (1971)	19
Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978)	19
Glen Theatre, Inc. v City of South Bend, Nos. 88-3006, 88-3244 (7th Cir. May 24, 1990)	5, 13 14, 15 16
Grand Faloon Tavern, Inc. v Wicker, 670 F.2d 943 (11th Cir. 1982)	10, 11
Iacobucci v City of Newport, 479 U.S. 92 (1986)	9
Kew v Senter, 416 F.Supp. 1101 (1976)	11, 12
New York State Liquor Authority v Bellanca, 452 U.S. 714 (1981)	9

Schad v Mt. Ephraim,
452 U.S. 61 (1981) 7

South Florida Free Beaches v
City of Miami, 548 F.Supp.
1101 (1976) 16

Taylor Novelty, Inc. v City
of Taylor, Nos.85-1439, 85-1506,
slip op. (6th Cir. 1987) 10

Texas v Johnson,
109 S.Ct. 2533 (1989) 17, 19

Wal-Juice Bar v City of
Oak Grove, 899 F.2d 1502
(6th Cir. 1990) 9

OTHER

Petition for a Writ of Certiorari
to the United States Court of
Appeals for the Seventh Circuit
(June 29, 1990) 15

INTEREST OF AMICUS CURIAE

Consent of the Parties

American Family Association, Inc. (AFA), has received consent of the parties to the filing of this Brief Amicus Curiae. Consent of the Petitioner, Michael Barnes, et. al, was received from Wayne E. Uhl, Esq., Deputy Attorney General and of Respondents, Glen Theatre, Inc., et al, from their attorney, Lee J. Klein, Esq.

American Family Association's Interest

AFA is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA operates as a

leader of citizen and church participation to promote traditional American family values and apply the Biblical ethic in society. As Amicus, AFA has supporters in all 50 states; has approximately 600 chapters of local citizens who are active in seeking to preserve community integrity through the implementation of public decency laws and has over 400,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is consistently asked by local governments and law enforcement officers for advice and guidance on methods of regulating nude dancing establishments. AFA chapters actively seek to preserve the integrity of their local communities. The

effective use of public decency statutes to preserve traditional values is a method which is used by local chapters.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon individuals appearing nude in public. Amicus, and the citizens it represents, would be severely harmed if the decision of the United States Court of Appeals for the Seventh Circuit was permitted to stand. Consequently, AFA will support the position of the State of Indiana regarding the constitutional application of public decency laws to nude dancing.

SUMMARY OF ARGUMENT

This Court has traditionally afforded nude dancing few First Amendment protections. The Seventh Circuit has disregarded these precedents and has extended prior Supreme Court case law beyond the bounds of the logical implications of those decisions.

The Seventh Circuit's decision would elevate nude dancing to a place that few activities within the State of Indiana enjoy. It would, in many circumstances, place nude dancing beyond the legitimate control of the State.

LAW AND ARGUMENT

I. THE SUPREME COURT HAS TRADITIONALLY AFFORDED NUDE DANCING MINIMAL CONSTITUTIONAL PROTECTION

A. Supreme Court Decisions Clearly Demonstrate that Nude Dancing is Afforded the Barest of First Amendment Protections

The Seventh Circuit in Glen Theatre, Inc. v City of South Bend, Nos. 88-3006, 88-3244 (7th Cir., May 24, 1990), relies on three decisions from the Supreme Court to justify the extension of First Amendment protection to nude dancing. First, the court looked to California v LaRue, 409 U.S. 109 (1972), in which the Supreme Court found that the regulation of nude dancing in establishments which served alcohol was within the powers of the state granted by the twenty-first amendment. In LaRue, the Court recognized that

"some of the performances to which these regulations address themselves are within the limits of constitutional protection." 409 U.S. at 118. The Supreme Court did not specify the particular qualities which afford a performance the protection of the First Amendment. However, from a reading of its decision, one is led to conclude that the Supreme Court found that such characteristics do exist and are capable of determination.

The second case the Seventh Circuit relies on is Doran v Salem Inn, 422 U.S. 922, 932 (1974). In Doran, the Supreme Court stated that "[a]lthough the customary 'barroom' type of nude dancing may involve the barest minimum of protected speech, we recognized [in LaRue] that this form

of entertainment might be entitled to first and fourteenth amendment protection." As the Supreme Court noted, the amount of protection afforded such activity is minimal, at best.

The Seventh Circuit's final authority was Schad v Mt. Ephraim, 452 U.S. 61, 66 (1981), in which the Supreme Court stated, "Nude dancing is not without its First Amendment protections from official regulations.' Id. (citations omitted)." However, once again this Court failed to determine to what extent the First Amendment protects nude dancing in light of legitimate state interests. The only issue clearly resolved in Schad, was that the state interest proffered was not

sufficient for a complete ban on all live entertainment, including family entertainment establishments. That the state interest was not sufficient to regulate sexually oriented businesses, nude dancing establishments specifically, was not the Court's conclusion and such a conclusion cannot be inferred from the opinion.

Thus, the cases from this Court that the Seventh Circuit relies upon are not squarely on point. They clearly do not establish that this Court has declared that nude dancing is afforded complete First Amendment protection. Whether, and to what extent, nude dancing is constitutionally protected is a matter yet to be determined by this Court.

B. There is a Conflict Among Courts as to the First Amendment Protection Afforded Nude Dancing

The Seventh Circuit has held that Indiana's public indecency statute is unconstitutional as applied to non-obscene nude dancing. Nude dancing, the Court states, is "inherently expressive," and thus deserves first amendment protection. Slip op. at 8.

This decision conflicts with the rulings of two other circuit courts and at least one district court. In Wal-Juice Bar v City of Oak Grove, 899 F.2d 1502 (6th Cir. 1990), the Sixth Circuit refused to recognize that the most recent Supreme Court cases extended First Amendment protection to nude dancing. The decisions in Iacobucci v City of Newport, 479 U.S. 92, 96 (1986) and New York State

Liquor Authority v Bellanca, 452 U.S. 714, 718 (1981) "rather plainly indicate[] that nude dancing is not a fundamental right entitled to heightened scrutiny under the due process clause." Earlier, in the unpublished decision of Taylor Novelty, Inc. v City of Taylor, Nos. 85-1439, 85-1506, slip op. at 5 n.1 (6th Cir. 1987) the same court refused to interpret Schad as extending First Amendment protection to coin operated machines for viewing nude dancing.

In Grand Faloon Tavern, Inc. v Wicker, 670 F.2d 943 (11th Cir. 1982), the Eleventh Circuit was also careful not to bring nude dancing within the full scope of First Amendment protection. The Court concluded that nude dancing "involves a substantial

degree of conduct." 670 F.2d at 948. Therefore, the Court did not enter into First Amendment analysis, but applied the O'Brien test.

Finally, at least one federal district court has upheld a public indecency statute similar to that of Indiana. The Court for the Northern District of Texas in Kew v Senter, 416 F.Supp. 1101, 1104 (N.D. Tex. 1976) refused to rule that a public nudity statute was overbroad, finding that "the behavior condemned falls so far down the scale toward conduct. . . and so far from 'pure speech'" that the regulation of nude dancing did not even trigger overbreadth analysis. Furthermore, the court stated that it was "difficult to conceive of ideas entitled to first amendment protection

which can be solely- or even best-expressed by baring the anus or genitals in the circumstances forbidden by the statutes." 416 F.Supp. at 1105.

II. THE SEVENTH CIRCUIT'S PROTECTION OF NUDE DANCING CONTRADICTS PRECEDENT AND BRINGS NUDE DANCING WITHIN THE FULL AMBIT OF THE FIRST AMENDMENT

Contrary to precedent, the Seventh Circuit in Glen Theatre, extends a new level of protection to nude dancing and takes any previously recognized protection from the range of "minimal" to that of significant. The rationale of the Seventh Circuit supports the position that nude dancing receives not just limited protection, but comes fully within the scope of the First Amendment. The question the Seventh Circuit sought to

resolve was "whether '[a]n intent to convey a particularized message was present and [whether] the likelihood was great that the message would be understood by those who view it.' Texas v Johnson, 109 S.Ct. 2533, 2539 (1989) (quoting Spence v Washington, 418 U.S. 405, 410-411)." Slip op. at 11. To answer this question, the Court of Appeals looked to the history of dance.

After a review of the history of dance as an art form, the Seventh Circuit found that dance was "inherently expressive". Slip op. at 8. When nudity is combined with dance, the message was clear to the court: the dancers are communicating with an "emotional" message of "eroticism and sensuality". Slip op.

at 11. It is this message which the court found to be the determining characteristic--the quality separating protected expression from unprotected conduct.

The Seventh Circuit, however, asserts that such a definition does not make nude dancing immune to state regulation.

> A sovereign may establish reasonable time, place and manner restrictions on protected expression. Renton v Playtime Theatres, Inc., 475 U.S. 41, 46-47 (1986). Such legislative power unquestionably permits the state to bar the imposition of nude dancing upon the public in settings such as streets, parks, and beaches. Similarly, it may regulate expressive conduct for reasons unrelated to the suppression of speech. United States v O'Brien, 391 U.S. 367 (1968). It may also regulate nude dancing under the power granted by the Twenty-first Amendment. California v LaRue, 409 U.S.

109 (1972); City of Newport v Iacobucci, 107 S.Ct. 383 (1986). And it most certainly may ban obscene nude dancing. Sable Communications, 109 S.Ct. at 2835.

Slip op. at 15.

In reality, the Seventh Circuit is not recognizing the ability of a state to regulate nude dancing. The Seventh Circuit's decision effectively prohibits the state from exercising its right to regulate public nudity. As the State of Indiana observes in its Petition for Certiorari, "the Seventh Circuit's reasoning . . . is not limited to nude dancing inside bars and 'bookstores' before consenting adults." Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, at 12 (June 29, 1990). In light of the Seventh

Circuit's decision, there is nothing left to protect the unsuspecting beach-goer from an "organized flasher, shucking his coat in a booth next to the hot dog vendor and adding a boom box and hip motions." Slip op. at 91 (Easterbrook, J. dissenting). What the Seventh Circuit has failed to recognize is that what has served to protect the public from open nudity has not been the public's right to be shielded from what it might find offensive. On the contrary, it has been that the various courts have not been able to find any significant expressive conduct in public nudity so as to protect it from state regulation. South Florida Free Beaches v City of Miami, 548 F.Supp. 53 (S.D. Fla. 1982). Yet, when the

Seventh Circuit assigns expressive meaning to nude dancing, it becomes constitutionally protected whereas before it was subject to reasonable regulation.

Taken in conjunction with other recent public expression cases, the decision of the Seventh Circuit nullifies the right of the general public to be shielded from rhythmic nudity. Over the past two decades, the Supreme Court has severely limited the rights of the general public to be shielded from expression they might find offensive. This Court held, in Texas v Johnson, 109 S.Ct. 2533, 2544 (1989), that "if there is a bedrock principle underlying the first amendment, it is that the Government may not prohibit the expression of an

idea simply because society finds the idea itself offensive or disagreeable."

The message of "eroticism and sensuality" purveyed by the dancers, is protected unless the state can prove that the viewers have a "substantial privacy interest . . . being invaded in an essentially intolerable manner." Cohen v California, 403 U.S. 15, 21 (1971). Only when this is demonstrated can the state "shut off discourse solely to protect others from hearing it." Id.

These criteria could not possibly be satisfied in the case of nude dancing on a public street, park or beach. A substantial privacy interest has only been recognized in situations in which there is a captive audience

unable to avoid contact with such expression. See, Federal Communications Commission v Pacifica Foundation, 438 U.S. 726 (1978). By the same measure, such a substantial privacy interest has been denied to the passerby on a public street. Erznoznik v Jacksonville, 422 U.S. 405 (1971).

It is doubtful that this Court intended that the protection it has afforded offensive political speech; see, Texas v Johnson and Cohen v California, be extended to nude dancing. This is particularly true in light of the manner in which this Court has treated nude dancing in the past. Taken to its logical conclusion, however, the Seventh Circuit's decision affords protection

to "non-obscene nude dancing for entertainment purposes" the same level of protection as political speech.

III. CONCLUSION

For the foregoing reasons, specifically recognizing that the Seventh Circuit's decision conflicts with Supreme Court precedent and decisions from other courts and that this decision effectively removes nude dancing from the realm of local regulation, this Court should grant this Petition for Certiorari.

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief Amicus Curiae of American Family Association, Inc., have been mailed this thirty-first day of July, 1990, to the following counsel of record:

Mr. Lee J. Klein, Esq.
Klein and Shafer, P.C.
Easterbrook Plaza
4121 Okemos Road- Suite 20
Okemos, Michigan 48864

Wayne E. Uhl
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204

Peggy M. Coleman

Peggy M. Coleman
Attorney for Amicus Curiae
American Family Association

Supreme Court, U.S.
FILED
AUG 1 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-26

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

-vs-

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, CONNECTICUT, MISSOURI, NORTH CAROLINA, AND PENNSYLVANIA AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

ROBERT K. CORBIN
Attorney General of
the State of Arizona

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
(Attorney of Record)

Attorneys for AMICI CURIAE

CLARINE NARDI RIDDLE
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106
(203) 566-2026

JOHN J. KELLY
Chief State's Attorney of Connecticut
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

WILLIAM L. WEBSTER
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

LACY H. THORNBURG
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-7387

ERNEST D. PREATE, JR.
Attorney General of the Commonwealth of Pennsylvania
1600 Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 787-6348

QUESTIONS PRESENTED

1. Was the Seventh Circuit's conclusion that nude dancing is constitutionally protected speech, a federal question, decided in conflict with the state courts of last resort?

2. Is the regulation of public nudity a compelling state interest, within its police power?

3. Is the Indiana Public Indecency statute a valid time, place and manner regulation?

4. Does the Seventh Circuit's decision conflict with applicable decisions of this Court?

5. Is this an "as applied" challenge to the statute rendering the conduct involved unprotected by the First Amendment?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES AND AUTHORITIES	iv
INTEREST OF AMICI CURIAE	1
ARGUMENT IN SUPPORT OF GRANTING THE WRIT	2
ARGUMENTS	
I	
THE SEVENTH CIRCUIT'S CONCLUSION THAT NUDE DANCING IS CONSTITUTIONALLY PROTECTED SPEECH IS A FEDERAL QUESTION DECIDED IN CONFLICT WITH STATE COURTS OF LAST RESORT.	2
II	
REGULATION OF PUBLIC NUDITY IS A COMPELLING STATE INTEREST, WITHIN ITS POLICE POWER, AND ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.	5
III	
THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.	13
IV	
THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.	20

V

THIS IS AN "AS APPLIED" CHALLENGE TO THE STATUTE AND THE CONDUCT INVOLVED HERE IS CLEARLY NOT PROTECTED BY THE FIRST AMENDMENT. 24

CONCLUSION 26

TABLE OF CASES AND AUTHORITIES

Cases	Page
American Booksellers Ass'n, Inc. v. Hudnut 771 F.2d 323 (7th Cir. 1985)	12
Bowers v. Hardwick 478 U.S. 186 (1986)	9,10
Bread v. Alexandria 341 U.S. 622 (1950)	11
California v. LaRue 409 U.S. 109 (1972)	12,25
City of Chattanooga v. McCoy 645 S.W.2d 400 (Tenn. 1983)	3,4,24
Crownover v. Musick 509 P.2d 497 (1973)	13
Dallas v. Stanglin 490 U.S. ___ 109 S. Ct. 1591 104 L. Ed. 2d 18 (1989)	7
DeFunis v. Odegaard 416 U.S. 312 (1974)	25
Gabriele v. Town of Old Orchard Beach 420 A.2d 252 (Me. 1980)	24
Glen Theatre, Inc. v. Civil City of South Bend 695 F. Supp. 414 (N.D. Ind. 1988)	18,25
Hicks v. Miranda 422 U.S. 332 (1975)	23,24

Jacobellis v. Ohio
378 U.S. 184 (1964) 11

Kev, Inc. v. Kitsap County
793 F.2d 1053 (9th Cir. 1986) 20

Kew v. Senter
416 F. Supp. 1101
(N.D. Tex. 1976) 4,8,13

Koppinger v. City of Fairmount
248 N.W.2d 708 (Minn. 1976) 2,7

Le Roy v. Sidley
82 Eng. Reprint 1036 (1663) 3

Miller v. California
413 U.S. 15 (1973) 5,9,15

New York v. Ferber
458 U.S. 747 (1983) 15

O'Day v. King County
749 P.2d 142 (Wash. 1988) 7

Olson v. City of West Fargo
305 N.W.2d 821 (N.D. 1981) 24

Paris Adult Theatre I v. Slaton
413 U.S. 49 (1973) 10,11

Renton v. Playtime Theatres, Inc.
475 U.S. 41 (1986) 12,14,19

Roth v. United States
354 U.S. 476 (1957) 5,6

State v. Baysinger
397 N.E.2d 580 (Ind. 1979) 20,21,22,23

State v. Baysinger, et al., sub nom.
Clark v. Indiana
446 U.S. 931 (1980) 23,24

Truet v. State
3 Ala. App. 114
57 So. 512 (1912) 3

United States v. Biocic
730 F. Supp. 1364 (D. Md. 1990) 8,9

United States v. O'Brien
391 U.S. 367 (1968) 5,6,7,8,12,13

Virginia Pharmacy Board v. Virginia
Citizens Consumer Council, Inc.
425 U.S. 748 (1976) 14

Authorities

18 U.S.C.
§ 1464 15
§ 2251 15

Indiana Code
§ 35-45-4-1 8,16

United States Constitution
First Amendment 3,4,5,8,13,19,24
Twenty-first Amendment 25,26

Where Do You Draw the Line?,
ed. Victor B. Cline (Brigham Young
University Press, 1974) 16

INTEREST OF AMICI CURIAE

Arizona, Connecticut, Missouri, North Carolina, and Pennsylvania[1] have "indecent exposure" or "public indecency" statutes, ordinances or other regulations that are similar to the Indiana statute under review in this case. Like Indiana's statute, these laws proscribe public nudity in some manner. The opinion by the Seventh Circuit in this case is so broad that it arguably challenges the constitutionality of all the statutes of the undersigned states.

---

1. The Commonwealth of Pennsylvania's legislative scheme does not generally prohibit public nudity; however, nude barroom dancing, the activity at issue here, is prohibited. For that reason Pennsylvania joins Argument V only.

ARGUMENT IN SUPPORT OF GRANTING THE WRIT

The States joining in this brief all have similar or related "indecent exposure" or "public indecency" statutes, ordinances, or regulations. Because the United States Court of Appeals for the Seventh Circuit's opinion in this case is so broad and far-reaching -- starting down the road to a possible constitutional challenge of their own statutes -- these parties have filed a joint brief urging the Court to grant the petition and issue a Writ of Certiorari.

I

THE SEVENTH CIRCUIT'S CONCLUSION THAT NUDE DANCING IS CONSTITUTIONALLY PROTECTED SPEECH IS A FEDERAL QUESTION DECIDED IN CONFLICT WITH STATE COURTS OF LAST RESORT.

Nudity is not protected expression, but conduct, that states have a substantial interest in regulating via their police power. Koppinger v. City of Fairmount, 248 N.W.2d 708 (Minn. 1976). Nudity was

a traditional common-law crime, an act malum in se. Le Roy v. Sidley, 82 Eng. Reprint 1036 (1663); Truet v. State, 3 Ala. App. 114, 57 So. 512 (1912). Numerous state courts have held that "nude dancing" of the barroom variety is not protected. The petitioners set forth a list of the states that have rejected this claim that the First Amendment protects nude dancing. (Petition for Writ of Certiorari, pp. 14-16.) These State Supreme Courts are Indiana, Florida, Nebraska, Arkansas, Maine, Louisiana, and Michigan.

In addition, the Supreme Court of Tennessee has reached the same conclusion in City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983), wherein the court stated:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or

> prohibit any legitimate speech or expression entitled to First Amendment protection. It is a travesty to allow nude and crude public exhibitors of the human body, the privilege of asserting the rights of persons who contribute to society's permanent values and are entitled to First Amendment protection, and to read into a public indecency statute an intent to suppress free speech and expression.

645 S.W.2d at 403. As in the instant case, the dancers in McCoy made no claim that their conduct involved any speech or expression of ideas entitled to First Amendment protection. Id.

Other courts have reached the same result. In Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976), the plaintiff argued that the Texas statutes of "indecent exposure" and "disorderly conduct" could not be applied to her nude barroom performance. The district court rejected this argument and held that "the statutes in question are primarily directed at conduct." 416 F. Supp. at 1105.

II

REGULATION OF PUBLIC NUDITY IS A COMPELLING STATE INTEREST, WITHIN ITS POLICE POWER, AND ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.

The United States Supreme Court has recognized the right of cities and states to regulate offensive conduct in public places even though it may involve expressive activity or speech. United States v. O'Brien, 391 U.S. 367 (1968). This important right was recognized in Miller v. California, 413 U.S. 15 (1973):

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.

413 U.S. at 26 n.8. Even Justice Douglas acknowledged this in his dissenting opinion in Roth v. United States, 354 U.S. 476 (1957):

> No one would suggest that the First Amendment permits nudity in

> public places . . . . Government should be concerned with antisocial conduct, not with utterances.

354 U.S. at 512-13. It is also clear that:

> When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

O'Brien, 391 U.S. at 376. Therefore, assuming for the purpose of this argument that the nude "barroom" dance involves expression, it does not follow that all regulation of it is forbidden. Indeed, governmental regulation is permissible if certain conditions are met, as set forth in O'Brien:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental

> restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

It is proper to analyze this case in light of O'Brien, because "speech" and "nonspeech" are combined in the same course of conduct. Nudity -- the condition or state of being unclothed -- is conduct or activity. Nudity is not protected expression, but conduct, which states have a substantial interest in regulating via its police power. Koppinger. However, dance may be classified as a form of expression under some circumstances. O'Day v. King County, 749 P.2d 142 (Wash. 1988); but see Dallas v. Stanglin, 490 U.S. ___, 109 S. Ct. 1591, 104 L. Ed. 2d 18, 25-26 (1989) ("It is possible to find some kernel of expression in almost every activity a person undertakes - for

example, walking down the street, or meeting one's friends at a shopping mall -- but such kernel is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons -- coming together to engage in recreational dancing -- is not protected by the First Amendment.") Thus, in this case, a combination of conduct (nudity) and possible expression (dancing) exist together and the four-prong test of O'Brien is applicable.

Does this regulation, Indiana Code Section 35-45-4-1, satisfy O'Brien? First, there can be no question that "regulation of indecent exposure and of conduct inducing to breaches of the peace are traditional and proper subjects of the police power . . . ." Kew v. Senter, 416 F. Supp. 1101, 1105 (N.D. Tex. 1976). Also, in United States v. Biocic,

730 F. Supp. 1364 (D. Md. 1990), the court found:

> In our system of government, the states and their subdivisions are the repositories of the general police power, which can be utilized to proscribe conduct that the community finds offensive to its sense of decency.

730 F.2d at 1366. This is the underlying authority on which the entire line of obscenity cases has been upheld. Cf. Miller v. California, 413 U.S. 15 (1973).

Nor can there be serious debate concerning the governmental interest at issue here. Certainly this regulation furthers an important or substantial governmental interest -- indeed, interests (in that they are numerous and established). One compelling interest is the preservation of the moral structure of society. The Court recognized this as a legitimate governmental interest in Bowers v. Hardwick, 478 U.S. 186 (1986), wherein the Court refused to invalidate

Georgia's sodomy law because the plaintiff claimed there was no rational basis for it:

> This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.

478 U.S. at 196.

The Court has also approved the compelling governmental interest of maintaining a "decent society." As the Court recognized in response to the defendants' argument that any obscene materials used by "consenting adults" were constitutionally protected: "Rights and interests 'other than those of the advocates are involved' . . . there is a 'right of the Nation and of the States to maintain a decent society . . . .'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-60 (1973) (quoting Justice Reed,

Bread v. Alexandria, 341 U.S. 622, 642 (1950) and Chief Justice Warren, Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (dissenting opinion)). The Court went on to say:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

413 U.S. at 63.

Beyond the governmental interest in preserving society's moral structure and decency, the states have the further valid interests in preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct

attendant thereto. See California v. LaRue, 409 U.S. 109 (1972). Further, there is the paramount interest of preventing the sexual exploitation and degradation of women. American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986). These are all substantial interests and judicially recognized. The State of Indiana is entitled to rely on the experiences of other jurisdictions as a basis for this legislation. See Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986).

The third part of the O'Brien test is whether the governmental interest is unrelated to the suppression of free expression. O'Brien, 391 U.S. at 377. Clearly, the Indiana "public indecency" statute is unrelated to speech or its suppression. The regulation is aimed at conduct -- public nudity -- not speech.

Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

Finally, the restriction, if any, on First Amendment freedoms caused by this prohibition against public nudity is incidental and no greater than is essential to the furtherance of Indiana's legitimate interests. Not all nudity is proscribed, simply public nudity. The "actor" remains free to speak and express him or herself freely, but he or she "cannot appear with genitals or breasts exposed" while doing so. Crownover v. Musick, 509 P.2d 497 (1973). Therefore the statute meets the requisite condition of O'Brien and is constitutionally valid.

III

THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.

A governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free

speech. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Assuming that the "barroom" dancing at issue here is protected "speech" or "expression," content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. 475 U.S. at 47. A regulation is "content-neutral" if it is justified without reference to the content of the regulated speech. 475 U.S. at 48; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

There is a fundamental difference between statutes that are "content-based" and those that are "content-neutral." "Content-based" statutes focus on, and generally proscribe, certain unlawful speech. For instance, they proscribe the

distribution of obscene speech and the possession and dissemination of speech which is child pornography.[2] Such laws are based on objections to the "content" of the speech itself. It is unnecessary for a prosecutor to establish the harmful effects or consequences of such unlawful speech. Such speech has no protection under the United States Constitution.[3] "Content-based" laws generally seek to

---

2. See, e.g., 18 U.S.C. § 1464 proscribing the distribution of obscene matter and 18 U.S.C. § 2251 proscribing the distribution of child pornography. Virtually all states have similar laws.

3. Miller v. California, 413 U.S. 15, 23 (1973) ("this much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"); New York v. Ferber, 458 U.S. 747, 753 (1983) ("child pornography . . . [is] a category of material outside the protection of the First Amendment").

eradicate the unlawful and constitutionally unprotected speech.[4]

Time, place, and manner regulation is primarily concerned with laws that are "content-neutral." Such laws focus on the negative secondary consequences or harmful effects that certain speech and speech related activities cause. These laws regulate the time, place, and manner of these activities in order to minimize or vitiate the harmful effects.

The statute under review in this case, Indiana Code Section 35-45-4-1, provides in pertinent part:

---

4. For example, false advertising, speaking words which amount to a conspiracy or obstruction of justice, sedition, incitement, yelling "FIRE!" in a crowded theatre when there is no fire, using words which constitute a bribe, and committing perjury under oath. See Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

(a) A person who knowingly or intentionally, in a public place:

(1) engages in sexual intercourse;

(2) engages in deviate sexual conduct;

(3) appears in a state of nudity; or

(4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor.

(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

The substantial governmental interests in proscribing public nudity have been discussed previously, they include: preservation of the moral structure; right to a decent society; prevention of sexual assaults and prostitution; and elimination of sexual exploitation of women. The purpose of the Indiana

statute is to further these goals by prohibiting public nudity. It has nothing to do with content or speech. Under the facts of this case, plaintiffs are entitled to express any opinions or ideas they wish (although the record clearly demonstrates that they admit that they were not attempting to convey any message, other than to increase the patrons' thirst, as the District Court so found[5]). The state only requires that

---

5. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context, to appear nude in public for money.

Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 418 (N.D. Ind. 1988).

they must wear a minimal amount of covering. Specifically, they may express political, scientific, artistic or prurient messages in their "dance," but they must be at least scantily clad in order to comply with the statute. This regulation is equally applied to others who might wish to respond. Renton, 475 U.S. at 48-49 ("The ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored, or more controversial views' [citation omitted].")

Further, these minimal or incidental requirements do not unreasonably limit alternative avenues of communication, nor do they significantly burden First Amendment rights. As the Ninth Circuit

stated in Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986), when discussing distance and stage requirements for barroom dancers:

> While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.

Similarly, the plaintiffs "message may be slightly less effective" wearing scant attire, however, the burden is insignificant. Thus the regulations are reasonable time, place, and manner restrictions that only slightly burden speech.

IV

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Indiana Supreme Court previously held this statute constitutional in State

v. Baysinger, 397 N.E.2d 580 (Ind. 1979). The facts in that case are almost identical to the ones at bar. Defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. 397 N.E.2d at 583. The Court responded:

> Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any

pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances.

397 N.E.2d at 587 (emphasis added). Thus the court held, in light of the facts before them, that this type of "barroom" dancing was not constitutionally

protected. However, the court recognized that under certain other facts, nudity in public might be constitutionally protected expression. Again, the facts in Baysinger are identical to the facts of the present case.

Baysinger, by itself, only has precedential value for Indiana courts. However, on May 12, 1980, this Court dismissed the Baysinger appeal for want of a substantial federal question. State v. Baysinger, et al., sub nom. Clark v. Indiana, 446 U.S. 931 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975), a dismissal of an appeal from a state court upholding a state statute against federal constitutional attack, for want of a substantial federal question, is a ruling on the merits, with precedential force for all courts except the Supreme Court itself. Although the Seventh Circuit did not feel bound by precedent,

other courts have felt obligated to follow Baysinger. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983); Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980); and Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981).

Rather than speculating how the Supreme Court would rule on this issue (Majority Op. p.8, n.3), the Court of Appeals should have followed the precedent already established by Baysinger and Hicks.

V

THIS IS AN "AS APPLIED" CHALLENGE TO THE STATUTE AND THE CONDUCT INVOLVED HERE IS CLEARLY NOT PROTECTED BY THE FIRST AMENDMENT.

This case is a constitutional challenge to the Indiana "public indecency" statute, as applied to the plaintiffs' actions in three consolidated cases. In two of the cases, the activity complained

about -- barroom nude dancing -- took place in establishments that served alcohol. The third case, involving plaintiff Glen Theatre, did not involve the sale or presence of alcoholic beverages. The establishment in the latter case was destroyed by fire and that cause of action thereby became moot. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 416 (N.D. Ind. 1988); see DeFunis v. Odegaard, 416 U.S. 312 (1974).

The remaining cases involve licensed premises on which alcoholic beverages are dispensed. The Supreme Court has previously held that states, by virtue of the Twenty-first Amendment, have "wide latitude" in regulating nude and seminude entertainment within the confines of establishments that serve alcoholic beverages. California v. LaRue, 409 U.S. 109 (1972), reh. denied, 410 U.S. 948

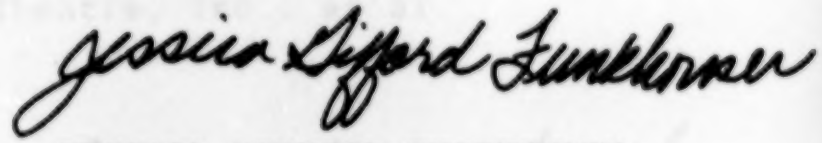
(1973). Clearly, this statute as applied to the remaining plaintiffs is fully constitutional, since the Twenty-first Amendment comes into play and the Supreme Court has previously held that nude dancing can be banned from places that dispense alcoholic beverages.

CONCLUSION

For the foregoing reasons, Amici support the granting of a Writ of Certiorari in this matter.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division
(Attorney of Record)

Attorneys for AMICI CURIAE

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed August 1, 1990, to:

CHARLES A. ASHER, ESQ.
205 First Bank Building
205 West Jefferson Blvd.
South Bend, Indiana 46601
(219) 233-9341
Counsel for Respondents
Darlene Miller, et al.

ROBERT C. ROSENFELD, ESQ.
Deputy City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241
Counsel for Respondents
Civil City of South Bend, et al.

LEE J. KLEIN, ESQ.
East Brook Plaza
4121 Okemos Road, Suite 20
Okemos, Michigan 48864
(517) 349-8666
Counsel for Respondents
Glen Theatre, Inc., et al.

Jessica Gifford Funkhouser

JESSICA GIFFORD FUNKHOUSER
Chief Counsel
Criminal Division
1275 West Washington
Phoenix, Arizona 85007
(Attorney of Record)

4176D jd

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

JOINT APPENDIX

LINLEY E. PEARSON
Attorney General of Indiana
WAYNE E. UHL*
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
(317) 232-6333
Counsel for Petitioners

BRADLEY J. SHAFER*
LEE J. KLEIN
KLEIN & SHAFER, P.C.
4121 Okemos Road, Suite 20
Okemos, Michigan 48864
(517) 349-8666
Counsel for Respondents Glen Theatre, Inc., et al.

PATRICK LOUIS BAUDE*
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927

ROBERT C. ROSENFELD*
Assistant City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241
Counsel for Respondents Civil City of South Bend, et al.

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341
Counsel for Respondents Darlene Miller, et al.

Counsel of Record

PETITION FOR CERTIORARI FILED JULY 2, 1990
CERTIORARI GRANTED OCTOBER 1, 1990

Graphics LTD., Indianapolis, IN 46202

TABLE OF CONTENTS

Page:

Relevant Docket Entries:

Glen Theatre, Inc. *et al.* v. Civil City of South Bend, *et al.*, N.D. Ind. No. S 85-0353 iii

Darlene Miller, *et al.* v. Civil City of South Bend, *et al.*, N.D. Ind. No. S 85-00598 iv

Darlene Miller, *et al.* v. Civil City of South Bend, *et al.*, 7th Cir. Nos. 88-3006 & 88-3244 v

Glen Theatre Documents:

Complaint (6/14/85) 1

Stipulations of Fact for Hearing on Motion for Preliminary Injunction (7/1/85) 10

Affidavit of Gayle Ann Marie Sutro (7/8/85) 13

Affidavit of Roger Judd (7/8/85) 15

Affidavit of Timothy J. Corbett (7/15/85) 18

[Memorandum and Order of District Court Granting Preliminary Injunction (7/26/85) ..... Pet. App. 149]

[Order of District Court Granting Permanent Injunction (10/10/85) ..... Pet. App. 148]

[Decision of Seventh Circuit on First Appeal (*Glen Theatre v. Pearson*, 9/30/86) ..... Pet. App. 140]

Darlene Miller Documents:

Complaint (10/18/85) 20

Affidavit of Darlene Miller (10/18/85) 26

Affidavit of Arthur Ford (10/18/85) 28

Affidavit of Arthur Ford (3/1/88)..... 30

Videotape (Plaintiffs' Ex. 1, 3/1/88) ..... Supplement

Joint Documents:

[Memorandum and Order of District Court on Remand (9/9/86), as Supplemented by Memorandum and Order on Motion to Alter or Amend Judgment (10/21/88) ..... Pet. App. 120]

[Panel Decision of Seventh Circuit after Remand (10/19/89) ..... Pet. App. 112]

[Order of Seventh Circuit Vacating Panel Decision (1/8/90) ..... Pet. App. 110]

[*En Banc* Decision of Seventh Circuit (5/24/90)..... Pet. App. 1]

Judgment of Seventh Circuit (5/24/90)..... 31

RELEVANT DOCKET ENTRIES

DISTRICT COURT:

Glen Theatre, Inc., et al. v. Civil City of South Bend, et al., N.D. Ind. No. S 85-0353

Date	Proceedings
6/14/85	Comp fld. summs issd (4) fwd to Pltfs cnsl. flng fee pd. (Prelm Injunc complt)
	Mot for P/I
7/1/85	HRG. ON P.I. Ptys. file stips. of fact.
7/8/85	AFFIDAVITS of Gayle Sutro & Roger Judd
7/15/85	AFFIDAVIT of Timothy J. Corbett
7/26/85	MEMORANDUM & ORDER granting pltfs' mot. for prel. inj.; defts. enjoined until further order of the Ct. from enforcing I.C. §35-45-4-1(a)(3) by way of arrest, prosecution or otherwise, against any live nude or semi-nude entertainment at the Chippewa bookstore as performed by pltfs. Gayle Ann Marie Sutro and Carla Johnson. SHARP, J. [Pet. App. 149-158.]
10/10/85	ORDER that defts. are permanently enjoined from enforcing I.C. §35-45-4-1(a)(3) by way of arrest, prosecution or otherwise, againnst [sic] any live nude or semi-nude entertainment at the Chippewa Bookstore as performed by pltfs. Gayle Ann Marie Sutro and Carla Johnson. SHARP, J. EOD 10/11/85 [Pet. App. 148.]
10/11/85	JUDGMENT [on above]
11/12/85	NOTICE OF APPEAL by defts Michael Barnes and Linley Pearson.

2/3/86	ORDER referring case to Judge Miller for all further proceedings. SHARP, J.
9/30/86	[Seventh Circuit: Judgment of district court reversed and remanded for further proceedings.]
2/27/87	ORDER: J. Miller disquals. himself, refers to Ch. J for reassgnt. MILLER, J.
3/18/87	ORDER: J. Sharp accepts jurisd. SHARP, J.
7/15/88	HRG. ON MOTS. Matter under advisement. SHARP, J.
9/9/88	MEMO & ORDER granting judgment in favor of defts. [Pet. App. 120-136.]
9/13/88	JUDGMENT in favor of defts. (EOD 9/13/88)
9/28/88	MOTION of pltfs. to alter or amend
10/24/88	MEMO & ORDER denying pltfs' mot to alter or amend jdmt. The finding of mootness is vacated & jdmt shall apply in full to Glen Theatre & pltfs who perform there. (J. Sharp) (EOD 10/24/88). [Pet. App. 136-139.]
11/16/88	PLTFS' NTC OF APPEAL of memo & ord ent 10/21/88.

Darlene Miller, et al. v. Civil City of South Bend, et al.,
N.D. Ind. No. S 85-00598

Date	Proceedings
10/18/85	COMPLAINT.
	MOTION for prel inj by pltfs.
	AFFIDAVITS of Arthur Ford and Darlene Miller

5/5/86	MEMORANDUM & ORDER denying mots. for preliminary injunction. MILLER, J.
12/15/86	W/O Obj the Mot to Consolidate w/ Cause No. S85-722 [Sandy Diamond, et al. v. Civil City of South Bend, et al.] was GRANTED
2/27/87	ORDER: J. Miller disquals. himself, refers to Ch. J for reassgnt. MILLER, J
3/18/87	ORDER: J. Sharp accepts jurisd. SHARP, J.
3/1/88	AFF of Arthur Ford, w/ pltf exhb 1 (videotape).
9/9/88	MEMO & ORDER granting judgment in favor of defts. [Pet. App. 120-136.]
9/13/88	JUDGMENT in favor of defts. (EOD 9/13/88)
10/11/88	PLTF NTC OF APPEAL.

COURT OF APPEALS:

Date	Proceedings
10/14/88	Darlene Miller, et al. v. Civil City of South Bend, et al. docketed as No. 88-3006.
11/21/88	Glen Theatre, Inc., et al. v. Civil City of South Bend, et al. docketed as No. 88-3244.
12/22/88	ORDER: The court, on its own motion, orders that these appeals are CONSOLIDATED for purposes of briefing and disposition.
10/19/89	JUDGMENT (before Wood, Coffey, and Flaum, JJ.): Judgment of District Court reversed and remanded in accordance with opinion filed this date. [Pet. App. 112-119.]
11/2/89	State Appellees' (Pearson, Barnes, and Indiana Alcoholic Beverage Commission) Petition for

	Rehearing and Suggestion of Rehearing In Banc filed.
1/8/90	ORDER: Rehearing *en banc* granted; judgment and opinion entered 10/19/89 vacated. [Pet. App. 110-111.]
5/24/90	JUDGMENT: Judgment of District Court REVERSED, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with opinion filed this date. [See Pet. App. 1-109.]
5/30/89	Motion for Stay of Mandate (by appellees Pearson, Barnes, and Indiana Alcoholic Beverage Commission).
6/1/90	Motion for Stay of Mandate granted, mandate stayed to and including July 2, 1990 (per Flaum, J.).

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., an Indiana Corporation; GAYLE ANN MARIE SUTRO; and CARLA JOHNSON,	)	[Filed-stamped June 14, 1985]
Plaintiffs,	)	
vs.	)	CAUSE NUMBER S 85-0353
CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND DECLARATORY JUDGMENT

Plaintiffs state their claims for relief as follows:

I.

JURISDICTION

1. This is a civil action whereby plaintiffs pray for preliminary and permanent injunctions enjoining the defendants from

enforcement of a certain statute (I.C. 35-45-4-1), commonly referred to as Indiana's public indecency law, of the State of Indiana, on the ground that it is unconstitutional as written and in its application and threatened application to plaintiffs in their activities described below. Further, plaintiffs pray for a declaratory judgment to determine the constitutionality of said statute of the State of Indiana, as written as applied and in its threatened application to them.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by 28 U.S.C. Section 1343(3), which provides in pertinent part that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .

and the organic law which further authorizes the institution of this suit founded on 42 U.S.C. Section 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Prayer for declaratory relief is founded on Rule 57 of the Federal Rules of Civil Procedure as well as 28 U.S.C. Section 2201, which provides in pertinent part:

> . . . any Court of the United States upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought . . . .

The jurisdiction of the Court to grant injunctive relief and damages is conferred on the Court by 28 U.S.C. Section 2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3. No other matter, civil or criminal, is pending in any state court involving any of the plaintiffs regarding the activities and events at issue here.

II.

PARTIES

4. Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Plaintiff Glen Theatre, Inc. is primarily engaged in the sale of books and magazines and in the exhibition of live entertainment and motion picture films at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana. Plaintiff Glen Theatre, Inc.'s business premises are hereafter referred to as the Chippewa Drive-In. Plaintiff Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live stage productions in the form of nude and semi-nude entertainment.

5. Plaintiff Gayle Ann Marie Sutro is a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years. She has degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California. She has studied acting, dance (including ballet, jazz, tap and exotic dance), and speech and languages. She speaks Spanish, Latin, and Italian. She is a current member in good standing of the Screen Actors Guild, the Screen Extras Guild, and Aftra. Plaintiff Sutro's theatrical and television

credits include performances as an actress and stunt woman in movies including Night Shift, Blues Brothers, and several adult films. Her acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's [sic], Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide. She has performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, has as an integral part of her dance removed her clothes and danced nude, has regularly engaged in live nude dancing as part of some of her performances and wishes to continue doing so free from criminal prosecution, has been scheduled, though her agent and plaintiff Glen Theatre, Inc. to make a personal appearance in conjunction with the area showing of one of her motion picture films at the Chippewa Drive-In, and has agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, her dance production at various times and dates throughout the summer and fall of 1985 commencing the week of July 15, 1985.

6. Plaintiff Carla Johnson is an entertainer who has performed on the stage of various theatres throughout the State of Indiana, including the stage at the Chippewa Drive-In, has engaged in live nude dancing as part of her performance, and wishes to continue the subject entertainment free from criminal prosecution.

7. None of the plaintiffs is the subject of a criminal charge pertaining to the issues herein.

8. Defendant Civil City of South Bend, Indiana, is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

9. Defendant Charles Hurley is named in his official capacity as Chief of Police of the South Bend Police Department, having the authority conferred upon him by the statutes of the State of Indiana and the ordinances of the City of South Bend to

supervise the operations of the South Bend Police Department.

10. Defendant Michael P. Barnes is named in his official capacity as Prosecutor of the County of St. Joseph, Indiana, having the prosecutorial authority conferred upon him by the statutes of the State of Indiana, which includes, among other things, the administration and implementation of the criminal statutes of the State of Indiana within St. Joseph County and the authority to determine which, and in what context, the criminal statutes are to be deemed violated and the authority to file informations initiating criminal proceedings within St. Joseph County.

11. Defendant Linley Pearson is named in his official capacity as Attorney General of the State of Indiana, having the authority conferred upon him by statute, custom, and usage to investigate alleged violations of the criminal and quasi-criminal statutes of the State and to act under color of authority of same.

12. The named defendants in their official capacities are joined to make enforceable to them and their agents, employees, and servants preliminary and permanent injunctions, a declaratory judgment, and other order of this Court.

III.

FACTUAL ALLEGATIONS

13. At times relevant hereto, the defendants and their agents, servants, employees, and others acting under their direction and control have acted and threatened to act under color of law to arrest and prosecute persons who entertained nude at the Chippewa Drive-In in alleged violation of I.C. 35-45-4-1.

14. I.C. 35-45-4-1 reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
> (1) Engages in sexual intercourse;

(2) Engages in deviate sexual conduct;
(3) Appears in a state of nudity; or
(4) Fondles the genitals of himself or another person; commits public indecency; a class A misdemeanor.
(b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

15. Between 1983 and March 27, 1985, plaintiff Glen Theatre, Inc. operated the bookstore located at the Chippewa Drive-In at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana, and to the adult public press materials in the form of motion picture films, books, and magazines, and also live entertainment.

16. The subject live entertainment has included dance and entertainment performances with dancers and entertainers in part nude as that term is defined in I.C. 35-45-4-1.

17. Shortly after live entertainment commenced at the Chippewa Drive-In, the defendant Civil City of South Bend through the South Bend Police Department began arresting persons so performing, and defendant Michael P. Barnes and his agents began prosecuting such persons for alleged violations of the Indiana public indecency statute, I.C. 35-45-4-1.

18. Between March 29, 1983 and March 27, 1985, at least nine performers have been so arrested, and all who have been arrested have been prosecuted. At least five of those performers have been convicted of violating the subject statute and have unsuccessfully appealed their convictions to the Indiana Court of Appeals and the Indiana Supreme Court.

19. On March 27, 1985, the defendant Civil City of South Bend through the South Bend Police Department and its employees arrested two nude entertainers at the Chippewa

Drive-In; thereafter, those two entertainers were charged by defendant Michael P. Barnes and his agents with violating I.C. 35-45-4-1.

20. Defendant Civil City of South Bend through the South Bend Police Department and its employees have threatened as late as March 27, 1985 to continue such arrests and referrals to prosecution should nude entertainment continue at the Chippewa Drive-In.

21. Such arrests, prosecutions, and threats of arrests and prosecutions have forced plaintiffs Gayle Ann Marie Sutro and Carla Johnson, who have never been arrested but are fearful of being arrested in St. Joseph County, to forego what each of them believes to be the exercise of constitutionally protected rights under the First and Fourteenth Amendments to the Constitution of the United States in their performances and entertainment.

22. Such arrests, prosecutions, and threats of arrests and prosecutions have forced plaintiff Glen Theatre, Inc. to discontinue live nude entertainment as of March 27, 1985.

23. As a result of the arrests, prosecutions, and threats of arrests and prosecutions subjected against nude entertainers at the Chippewa Drive-In by defendants, plaintiff Gayle Ann Marie Sutro does not wish to risk arrest and prosecution by the exercise of her constitutional rights and the fulfillment of her entertainment commitments as undertaken for the summer and fall of 1985.

24. The defendants, their agents, servants, and employees have established a policy, custom, practice, and pattern to enforce the Indiana public indecency statute.

25. The Indiana public indecency statute, being I.C.35-45-4-1, is unconstitutional as written and as applied to live nude entertainment, being repugnant to the First and Fourteenth Amendments to the Constitution of the United States.

26. The Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (Ind.1979) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984) has refused any narrowing judicial interpretation to answer the constitutional flaws of I.C. 35-45-4-1.

27. By reason of any continued conduct of the defendants in making arrests or initiating prosecutions for live nude entertainment at the Chippewa Drive-In, plaintiffs' rights under the First and Fourteenth Amendments to the Constitution would be violated to their irreparable harm for which plaintiffs have no adequate remedy at law. Immediate and irreparable injury, incalculable constitutional loss and damage to plaintiffs, and a chilling effect on the exercise of any member of the public's constitutional rights would result if an injunction is not issued forbidding defendants, their agents, servants, and employees from continuing in their described conduct.

WHEREFORE, plaintiffs pray that:

1. Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Court.

2. A preliminary injunction issue from this Court upon hearing restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C.35-45-4-1 in the factual context at bar, all pending a hearing and determination of plaintiffs' application for preliminary injunction and declaratory relief.

3. Upon final hearing a permanent injunction issue from this Court restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. 35-45-4-1 in the factual context at bar.

4. A declaratory judgment declaring I.C. 35-45-4-1 to be unconstitutional on its face, or in the alternative that this Court declare the application and threatened application in the afore-

mentioned statute to plaintiffs' described conduct to be unconstitutional.

5. Plaintiffs have such other relief as may be appropriate under the circumstances in this case together with costs and attorney fees pursuant to 42 U.S.C. Section 1988.

Respectfully submitted,

LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
Telephone: (219) 233-9341

Lee J. Klein*
8252 East Lansing Road
Suite 101
Durand, Michigan 48429
Telephone: (313) 365-2560
ATTORNEYS FOR PLAINTIFFS

*To be admitted *pro hac vice*.

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[Filed-stamped
	)	July 1, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
	)	
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
	)	
Defendants.	)	

STIPULATIONS OF FACT FOR HEARING ON MOTION FOR PRELIMINARY INJUNCTION

The parties through their counsel stipulate to the following facts in this cause:

1. Plaintiff Glen Theatre, Inc. is an Indiana corporation with its business located in Indiana. Plaintiff Glen Theatre, Inc. is primarily engaged in the sale of books and magazines and in the exhibition of live showings and motion picture films at a fully enclosed bookstore at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana. Plaintiff Glen Theatre, Inc.'s business premises are hereafter referred to as the Chippewa Bookstore. Plaintiff Glen Theatre, Inc. has offered and wishes to continue to offer to the interested adult public live nude and semi-nude showings.

2. None of the plaintiffs is the subject of a criminal charge pertaining to the issues in this case.

3. Defendant Civil City of South Bend is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

4. Defendant Charles Hurley is Chief of Police of the South Bend Police Department.

5. Defendant Michael P. Barnes is Prosecutor of the County of St. Joseph, Indiana.

6. Defendant Linley Pearson is the Attorney General of the State of Indiana.

7. This litigation concerns the constitutionality of I.C.35-45-4-1 which reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
>
> (1) Engages in sexual intercourse;
> (2) Engages in deviate sexual conduct;
> (3) Appears in a state of nudity; or
> (4) Fondles the genitals of himself or another person;
>
> commits public indecency; a class A misdemeanor.
>
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

8. Between March 29, 1983 and March 27, 1985, at least eleven persons have been arrested for alleged violations of I.C.35-45-4-1 at the Chippewa Bookstore, and all who have been arrested have been prosecuted. At least five of these persons have been convicted of violating the subject statute and have unsuccessfully appealed their convictions to the Indiana Court of Appeals and the Indiana Supreme Court. (See Exhibits 1 through 15.) [Exhibits omitted from Joint Appendix.]

9. On March 27, 1985, the defendant Civil City of South Bend through the South Bend Police Department and its employees arrested two nude persons at the Chippewa Bookstore; thereafter, those two persons were charged by defendant Michael P. Barnes and his agents with violating I.C.35-45-4-1.

10. No viewing of the live activity at the Chippewa Bookstore is possible for any unconsenting or unknowing member of the public passing the building. The building rests approximately 1,000 feet from the nearest public access and is a building fully enclosed by solid opaque building materials.

LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
ATTORNEYS FOR PLAINTIFFS

OFFICE OF ATTORNEY GENERAL

/s/ William E. Daily
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
ATTORNEYS FOR DEFENDANTS
LINLEY PEARSON AND
MICHAEL P. BARNES

OFFICE OF CITY ATTORNEY

/s/ Robert C. Rosenfeld
Assistant City Attorney
County-City Building
South Bend, Indiana 46601
ATTORNEYS FOR DEFENDANTS
CIVIL CITY OF SOUTH BEND
AND CHARLES HURLEY

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[File-stamped
	)	July 8, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF GAYLE ANN MARIE SUTRO

Comes now Gayle Ann Marie Sutro and having been duly sworn does depose and say as follows:

1. I am one of the plaintiffs herein.

2. I am a professional actress, stunt woman, and ecdysiast who has danced, modeled, and acted professionally for a period in excess of 15 years.

3. I have degrees from West Valley College in Saratoga, California (1975), San Jose State College (1978), the Los Gatos Academy of Dance, and the Marne Jones Modeling School in San Jose, California.

4. I have studied acting, dance (including ballet, jazz, tap, and exotic dance), and speech and languages.

5. I am a current member in good standing of the Screen Actors Guild, the Screen Extras Guild, and AFTRA.

6. My theatrical and television credits include performances as an actress and stunt woman in movies including Night Shift, Blues Brothers, and several adult films.

7. My acting and stunt woman work has included performances on several prime-time network television programs, including Love Boat, Magnum, P.I., the Fall Guy, McClain's Law, the Jefferson's [sic], Charlie's Angels, Hart to Hart, Flamingo Road, Fantasy Island, and Riptide.

8. I have an extensive modeling career and have modeled for photographs in such magazines as Penthouse, Shape, Fitness, and New Body.

9. I have performed professionally in live theatrical productions and live stage shows in numerous theatres throughout the United States, and I have as an integral part of my dance removed my clothes and danced nude in an art form I consider to be artistic.

10. My nude dance performances are appropriately choreographed and are an attempt to communicate as well as to entertain.

11. I have scheduled, through my agent and plaintiff Glen Theatre, Inc., to make a personal appearance in conjunction with a South Bend area showing of one of my motion picture films at the Chippewa Drive-In.

12. I have agreed to perform at the Chippewa Drive-In in South Bend, St. Joseph County, Indiana, my dance production at various times and days throughout the summer and fall of 1985 commencing with the week of Judy 15, 1985.

Further affiant saith not.

/s/ Gayle Ann Marie Sutro

[Notarized July 8, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC. et al.,	)	[Filed-stamped
	)	July 1, 1985.]
Plaintiff,	)	
	)	
vs.	)	CAUSE NUMBER
	)	S85-0353
	)	
CIVIL CITY OF SOUTH BEND,	)	
et al.,	)	
	)	
Defendants.	)	

AFFIDAVIT OF ROGER JUDD

Comes now Roger Judd and having been duly sworn does depose and say as follows:

1. I have been employed by Glen Theatre, Inc. for the last four years as the manager of the Chippewa Bookstore located at 500 West Chippewa Avenue, South Bend, St. Joseph County, Indiana.

2. Glen Theatre, Inc. through the Chippewa Bookstore is in the business of supplying adult entertainment through written and printed materials, movie showings, and live entertainment.

3. The live entertainment at the Chippewa Bookstore, when it is available, is offered to fee-paying consenting adults over the age of 18 (with two pieces of identification as proof of age).

4. No alcoholic beverages are sold, consumed, or allowed on the Chippewa Bookstore premises.

5. The live entertainment at the Chippewa Bookstore consists of nude and semi-nude performances and showing of the female body through glass panels. No physical contact is allowed or possible between the performers and the customers. Some of the live entertainment that has been offered has taken place on a dance floor or stage which is surrounded by six so-called "mini-booths." Customers sit in these mini-booths, which contain exactly one chair for the customer to be seated. The customer has a door that he closes before watching the show, and this door can be locked at the customer's discretion. The customer then places quarters in a timing mechanism which, as a matter of electrical mechanics, causes the light in his booth to go off and the light on the stage to go on thus allowing the customer to watch live nude dancers for a period of time. A second form of live entertainment is also available at the Chippewa Bookstore, which consists of the following. These are performances commonly referred to as "private showings." They also take place in a mini-booth where the customer deposits quarters in a timing mechanism while he is seated in a small enclosed room with a door that can be locked. After depositing the requisite amount of money, he can view a nude entertainer through a glass panel that, again, allows no physical contact between entertainer and customer. In these private showings, the customer sees the performer alone, and there is a telephone through which he can speak to the performer.

6. The Chippewa Bookstore is located on private property at least 1,000 feet from the nearest public access road.

7. No accidental viewing by any non-consenting member of the public of any live nude entertainment is possible at the Chippewa Bookstore as it is constructed or as the live entertainment has been offered or would be offered.

8. The performers of the live nude entertainment are prohibited from making any dates with any customers, performing any obscene acts, or soliciting any illegal acts. To my knowledge, no person has been arrested at the Chippewa Bookstore

for any criminal act other than a violation of Indiana's public indecency law, I.C. 35-45-4-1, with the exception of one patron who was arrested for burglary.

9. Glen Theatre, Inc. does not permit any live or printed or filmed depictions of beastiality [sic], sado-masocism [sic], pedaphelia [sic], or any other acts that it does not believe represent non-obscene healthy interests in erotic materials.

10. Between March 29, 1983 and March 27, 1985, there have been approximately eleven arrests of individuals at the Chippewa Bookstore for one or the other kind of adult entertainment described above. The latest arrests occurred on March 27, 1985 against ladies by the name of Anita Bonds and Beverly Molnar.

11. As a result of the raids of March 27, 1985, the Chippewa Bookstore has been forced to discontinue the showing of any live nude entertainment. Glen Theatre, Inc. has been forced to discontinue any live entertainment at the Chippewa Bookstore due to the raids, arrests, and prosecutions of entertainers.

12. Glen Theatre, Inc. has scheduled the appearance of plaintiff Gayle Ann Marie Sutro beginning on July 15, 1985, which appearance and subsequent appearances can only take place if further raids and arrests and prosecutions do not take place.

Further affiant saith not.

/s/ Roger Judd

[Notarized July 8, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

GLEN THEATRE, INC., AN INDIANA CORPORATION; GAYLE ANN MARIE SUTRO; AND CARLA JOHNSON,	)	[File-stamped July 15, 1985.]
Plaintiffs,	)	
vs.	)	CAUSE NO. S85-0353
CIVIL CITY OF SOUTH BEND; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; AND LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF TIMOTHY J. CORBETT

Comes now Timothy J. Corbett, and being duly sworn upon his oath, states that:

1. He is a Sergeant with the Police Department of the City of South Bend.

2. He is aware of the policies, customs, and practices of the South Bend Police Department with regard to enforcement of the public indecency statute.

3. He is an officer in the South Sector, and all arrests at the Chippewa Bookstore have been made by Officers of the South Sector.

4. At the time nude activity began at the Chippewa Bookstore, officials of the South Bend Police Department conferred with the St. Joseph County Prosecutor's Office and South Bend City Attorney's Office before making any arrests.

5. No arrests have ever been made for nudity as part of a play or ballet.

6. He is a competent adult residing in St. Joseph County, Indiana.

7. He has first-hand knowledge of the matters contained herein and would testify to the same if present in court.

/s/ Timothy J. Corbett

[Notarized July 15, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

COMPLAINT FOR PRELIMINARY INJUNCTION, PERMANENT INJUNCTION, AND RELATED RELIEF

Plaintiffs state their claims for relief as follows:

I: JURISDICTION

1. This is a civil action whereby plaintiffs pray for preliminary and permanent injunctions enjoining the defendants from enforcement of certain statute (I.C.35-45-4-1), commonly

referred to as Indiana's public indecency law, of the State of Indiana, on the ground that it is unconstitutional as written and in its application and threatened application to plaintiffs in their activities described below.

2. Jurisdiction is conferred on this Court for the resolution of the substantial constitutional questions presented by 28 U.S.C. Section 1343(3), which provides in pertinent part that the district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

> To redress the deprivation, under color of any state law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States . . .

and the organic law which further authorizes the institution of this suit founded on 42 U.S.C. Section 1983, which provides in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, or any state or territory subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and the laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The jurisdiction of the Court to grant injunctive relief and damages is conferred on the Court by 28 U.S.C. Section 2202, which provides:

> Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

3. No other matter, civil or criminal, is pending in any state court or other federal court involving either of the plaintiffs regarding the activities at issue here.

II: PARTIES

4. Plaintiff Darlene Miller resides at 27150 Kline Trail, South Bend, St. Joseph County, Indiana, 46614.

5. Plaintiff JR's Kitty Kat Lounge, Inc. is an Indiana corporation owning and operating an establishment commonly known as the Kitty Kat Lounge, located at 1315 South Michigan Street, South Bend, St. Joseph County, Indiana, 46618.

6. Neither of the plaintiffs is the subject of a criminal charge pertaining to the issues herein.

7. Defendant Civil City of South Bend, Indiana, is a municipal corporation organized under the statutes of the State of Indiana and is located in St. Joseph County, Indiana.

8. Defendant Indiana Alcoholic Beverage Commission is created by Indiana statutes, being I.C.7.1-2-1-1 et seq., which uses, among other means, so-called "enforcement officers" as defined and described in I.C.7.1-1-3-16 and I.C.7.1-2-2-9.

9. Defendant Charles Hurley is named in his official capacity as Chief of Police of the South Bend Police Department, having the authority conferred upon him by the statutes of the State of Indiana and the ordinances of the City of South Bend to supervise the operations of the South Bend Police Department.

10. Defendant Michael P. Barnes is named in his official capacity as Prosecutor of the County of St. Joseph, Indiana, having the prosecutorial authority conferred upon him by the statutes of the State of Indiana, which includes, among other things, the administration and implementation of the criminal statutes of the State of Indiana within St. Joseph County and the authority to determine which, and in what context, the criminal statutes are to be deemed violated and the authority to file informations initiating criminal proceedings within St. Joseph County.

11. Defendant Linley Pearson is named in his official capacity as Attorney General of the State of Indiana, having the

authority conferred upon him by statute, custom, and usage to investigate alleged violations of the criminal and quasi-criminal statutes of the State and to act under color of authority of same.

12. The individual defendants in this case are named in their official capacities are joined to make enforceable to them and their agents, employees, and servants any injunctions or other orders of this Court.

III: FACTUAL ALLEGATIONS

13. Plaintiff Darlene Miller wishes to perform live nude and semi-nude entertainment at the Kitty Kat Lounge in South Bend, Indiana, and presently refrains from doing so because of specific threats from the South Bend Police Department that she would be arrested for an alleged violation of I.C.35-45-4-1 if she so performed.

14. Plaintiff JR's Kitty Kat Lounge, Inc. wishes to present live nude and semi-nude entertainment at the Kitty Kat Lounge but presently refrains from doing so because of specific threats of arrest of any such performers for alleged violations of I.C.35-45-4-1.

15. I.C.35-45-4-1 reads as follows:

> *I.C. 35-45-4-1. Public indecency.* (a) A person who knowingly or intentionally, in a public place:
> (1) Engages in sexual intercourse;
> (2) Engages in deviate sexual conduct;
> (3) Appears in a state of nudity; or
> (4) Fondles the genitals of himself or another person;
> commits public indecency; a class A misdemeanor.
> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state. [I.C. 35-45-4-1, as added by Acts 1976, P.L. 148, Sec. 5, p. 718; 1977, P.L. 340, Sec. 76, p. 1533.]

16. On approximately July 27, 1985, plaintiffs attempted to present live nude and semi-nude entertainment at the Kitty Kat Lounge but terminated all such efforts when specifically advised by members of the South Bend Police Department that arrests pursuant to I.C.35-45-4-1 would follow.

17. The Indiana Supreme Court in *State v. Baysinger*, 397 N.E.2d 580 (Ind.1979) and *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984) has refused any narrowing judicial interpretation to answer the constitutional flaws of I.C. 35-45-4-1.

18. The Indiana Court of Appeals has recently refused any narrowing judicial interpretation to answer the constitutional flaws of I.C.35-45-4-1. See *Thompson v. State*, No.2-1084A327 (October 1, 1985).

19. By reason of any continued threats by the defendants to make arrests or initiate prosecutions for live nude and semi-nude entertainment at the Kitty Kat Lounge, plaintiffs' rights under the First and Fourteenth Amendments to the Constitution would be violated to their irreparable harm for which plaintiffs have no adequate remedy at law. Immediate and irreparable injury, incalculable constitutional loss and damage to plaintiffs, and a chilling effect on the exercise of any member of the public's constitutional rights would result if an injunction is not issued forbidding defendants, their agents, servants, and employees from making arrests or prosecutions against plaintiff Darlene Miller or any other entertainer at the Kitty Kat Lounge.

WHEREFORE, plaintiffs pray that:

1. Defendants be required to forthwith answer the Complaint in conformance with the rules and practices of this Court.

2. A preliminary injunction issue from this Court upon hearing restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C.35-45-4-1 in the factual

context at bar, all pending a hearing and determination of plaintiffs' application for preliminary injunction.

3. Upon final hearing a permanent injunction issue from this Court restraining the defendants and their agents, servants, and employees from further arrests or prosecutions or threats of arrests or prosecutions under I.C. 35-45-4-1 in the factual context at bar.

4. Plaintiffs have such other relief as may be appropriate under the circumstances in this case together with costs and attorney fees pursuant to 42 U.S.C. Section 1988.

Respectfully submitted,
LYSOHIR, SINGER & ASHER

/s/ Charles A. Asher
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
Telephone: (219) 233-9341

ATTORNEYS FOR PLAINTIFFS

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF DARLENE MILLER

Comes now Darlene Miller, one of the plaintiffs herein, and states as follows under oath:

1. I am one of the plaintiffs in this case.

2. I make these assertions as a competent witness and based upon my personal knowledge.

3. I wish to engage in live nude and semi-nude entertain-

ment at the Kitty Kat Lounge in South Bend, St. Joseph County, Indiana.

4. I refrain from doing so solely because of the risk of arrest and prosecution for public indecency under I.C. 35-45-4-1.

5. On approximately July 27, 1985, members of the South Bend Police Department warned against any nude or semi-nude entertainment at the Kitty Kat Lounge, which I had attempted earlier that evening. The South Bend officers involved stated that arrests would follow from any such nude entertainment.

Further affiant saith not.

/s/ Darlene Miller

[Notarized on October 18, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC., an Indiana Corporation,	)	[File-stamped October 18, 1985.]
Plaintiffs,	)	
vs.	)	NO. S85-00598
CIVIL CITY OF SOUTH BEND; INDIANA ALCOHOLIC BEVERAGE COMMISSION; CHARLES HURLEY, CHIEF OF POLICE OF THE SOUTH BEND POLICE DEPARTMENT; MICHAEL P. BARNES, PROSECUTOR OF THE COUNTY OF ST. JOSEPH, INDIANA; and LINLEY PEARSON, ATTORNEY GENERAL OF THE STATE OF INDIANA,	)	
Defendants.	)	

AFFIDAVIT OF ARTHUR FORD

Comes now Arthur Ford and states as follows under oath:

1. I am president of JR's Kitty Kat Lounge, Inc., one of the plaintiffs in this case.

2. I make this affidavit based upon personal knowledge, and I would be a competent witness to the assertions herein.

3. Plaintiff JR's Kitty Kat Lounge, Inc. wishes to present

nonobscene live nude and semi-nude entertainment at the establishment commonly known as the Kitty Kat Lounge located at 1315 South Michigan Street, South Bend, St. Joseph County, Indiana, 46618.

4. The only reason that I, as the managing authority of that establishment, do not permit such entertainment is the threat of criminal prosecutions for public indecency under I.C.35-45-4-1.

5. On or about July 27, 1985, nonobscene live nude and semi-nude entertainment was provided at the Kitty Kat Lounge but was discontinued when members of the South Bend Police Department arrived and stated that arrests and prosecutions for violations of Indiana's public indecency statute would follow.

Further affiant saith not.

/s/ Arthur Ford

[Notarized on October 18, 1985.]

IN THE
UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

DARLENE MILLER, et al.,	)	[File-stamped
	)	March 1, 1988.]
Plaintiffs,	)	
	)	
v.	)	CASE NO. S85-598
	)	
CIVIL CITY OF SOUTH BEND, et al.,	)	
	)	
	)	
Defendants.	)	

AFFIDAVIT OF ARTHUR FORD

1. My name is Arthur Ford.

2. I am the sole stockholder of JR's Kitty Kat Lounge, Inc.

3. I testified in this case on March 11, 1986, and I adopt and reaffirm that testimony here.

4. I have viewed plaintiffs' Exhibit 1, and the third and fourth of the four performances on that tape accurately depict the type of entertainment Darlene Miller and JR's Kitty Kat Lounge, Inc. wish to present to its consenting adult patrons.

Further affiant saith not.

/s/ Arthur Ford

[Notarized on February 26, 1988.]

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

JUDGMENT — WITH ORAL ARGUMENT

Date: May 24, 1990

BEFORE:
Honorable William J. Bauer, Chief Judge
Honorable Walter J. Cummings, Circuit Judge
Honorable Harlington Wood, Jr., Circuit Judge
Honorable Richard D. Cudahy, Circuit Judge
Honorable Richard A. Posner, Circuit Judge
Honorable John L. Coffey, Circuit Judge
Honorable Joel M. Flaum, Circuit Judge
Honorable Frank H. Easterbrook, Circuit Judge
Honorable Kenneth F. Ripple, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Michael S. Kanne, Circuit Judge

No. 88-3006

DARLENE MILLER, et al.,

Plaintiffs-Appellants

v.

CIVIL CITY OF SOUTH BEND, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Indiana, South Bend Division
No. 85 C 598, Judge Allen Sharp

This cause was heard on the record from the above mentioned district court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court in this cause appealed from be, and the same is hereby,

REVERSED, with costs, and the State is enjoined from enforcing its public indecency statute against these plaintiffs, in accordance with the opinion of this Court filed this date.

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

LINLEY E. PEARSON
Attorney General of Indiana
WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)
219 State House
Indianapolis, IN 46204
(317) 232-6333
Counsel for Petitioners

Graphics LTD., Indianapolis, IN 46202

QUESTIONS PRESENTED

1. Whether nude barroom-style or "go-go" dancing is "speech" protected by the First Amendment?

2. If nude barroom dancing is "speech", whether Indiana's general public indecency law is unconstitutional as applied to such dancing?

LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Seventh Circuit; the petitioners in this Court are in italics, all others are respondents:

NO. 88-3006

Plaintiffs-Appellants: Darlene Miller; JR's Kitty Kat Lounge, Inc.

Defendants-Appellees: Civil City of South Bend, Indiana; *Indiana Alcoholic Beverage Commission;* Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

NO. 88-3244

Plaintiffs-Appellants: Glen Theatre, Inc.; Gayle Ann Marie Sutro; Carla Johnson.

Defendants-Appellees: Civil City of South Bend, Indiana; Charles Hurley, Chief of Police of South Bend Police Department; *Michael P. Barnes, Prosecuting Attorney for St. Joseph County, Indiana; Linley E. Pearson, Attorney General of Indiana.*

TABLE OF CONTENTS

Page:

Questions Presented i
List of Parties ii
Opinions Below 1
Jurisdiction 2
Constitutional Provision and Statute Involved 2
Statement of the Case 3
Summary of Argument 9

Argument:

I. THE NUDE DANCING OF THE PLAINTIFFS IN THIS CASE IS NOT "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT 12
   A. Whether Conduct is "Speech" is a Factual Inquiry Based on Intent and the Presence of a Reasonably Perceivable, Particularized Message 12
   B. The Nude Barroom Dancing Proffered by the Plaintiffs in this Case is Not "Speech," As it Lacks any Element of Communication 16
      1. The dancing in this case lacks sufficient communicative elements to qualify as "speech" 16
      2. Nude barroom dancing is not "speech" simply because it entertains, or on the basis of the "emotional theme" found by the majority below 18
      3. The First Amendment does not protect the nude dancing in this case on the basis of artistic content 22

II. EVEN IF BARROOM EROTIC DANCING IS "SPEECH", INDIANA'S PUBLIC INDECENCY STATUTE IS VALID AS APPLIED TO SUCH DANCING 26

A. The Language and History of the Statute Show That it is Content-Neutral 27
B. A Generally Applicable, Content-Neutral Criminal Prohibition of Conduct is Valid Regardless of Its Impact on Expressive "Speech" 32
C. To The Extent that the Statute Incidentally Limits the Expression of Erotic Barroom Dancers, it is Valid As it Furthers Important State Interests Unrelated to Suppression of Expression 35
D. The Public Nudity Statute is a Reasonable "Manner" Restriction on Erotic Barroom Dancing 38
Conclusion 41

TABLE OF AUTHORITIES

Cases: *Page*

Ardery v. State, 56 Ind. 328 (1877) 29
Bose Corp. v. Consumers Union, 466 U.S. 485 (1984). 15
Bowers v. Hardwick, 478 U.S. 186 (1986)..... 34
California v. LaRue, 409 U.S. 109 (1972)..... 23, 37
City Counsel of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)..... 27, 38, 41
City Court of City of Tucson v. Lee, 16 Ariz. App. 449, 494 P.2d 54 (1972) 28
City of Dallas v. Stanglin, 490 U.S. 19, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989)..... 13, 21, 22
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)..... 27, 40
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)..... 11, 15, 16, 28, 38-39
Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)..... 28, 32
Craft v. Hodel, 683 F.Supp. 289 (D. Mass. 1988).... 30
Douglass v. Hustler Magazine, Inc., 769 F.2d 1128 (7th Cir. 1985), *cert. denied* 475 U.S. 1094 (1986). 25
Employment Division v. Smith, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)..... 11, 27, 33
Erhardt v. State, 468 N.E.2d 224 (Ind. 1984)..... 4
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 23, 37
FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. ____, 110 S.Ct. 768, 107 L.Ed.2d 851 (1990)... 28
Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988)..... *passim*
Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986)..... 5, 17
Hamling v. United States, 418 U.S. 87 (1974)..... 24
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)..... 25
Jenkins v. Georgia, 418 U.S. 153 (1974)..... 15, 24
Jennings v. State, 16 Ind. 335 (1861)..... 29
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) . 14
Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988)..... 33
Miller v. California, 413 U.S. 15 (1973)..... 23, 24, 37
Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) *(en banc)* ..... *passim*
Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), vacated 904 F.2d 1081 (7th Cir. 1990) *(en banc)*..... 7, 18
Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952)..... 29
Pope v. Illinois, 481 U.S. 497 (1987)..... 24

Redgrave v. Boston Symphony Orchestra, Inc., 855 F.2d 888 (1st Cir. 1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989) ... 20
Reynolds v. United States, 98 U.S. 145 (1879) 34
Roth v. United States, 354 U.S. 476 (1957) 23
Sir Charles Sydlyes Case, 83 Eng. Rep. 1146-1147 (K.B. 1663) 28
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975) 14
South Florida Free Beaches v. City of Miami, 734 F.2d 608 (11th Cir. 1984) 30
Spence v. Washington, 418 U.S. 405 (1974) .. 9,13-15,17,24
State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980) 3, 25, 31
Stromberg v. California, 283 U.S. 359 (1931) 13
Texas v. Johnson, 491 U.S. ___, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) 9, 13-17, 27
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969) 13
United States v. Albertini, 472 U.S. 675 (1985) 28, 36, 38, 40
United States v. Eichman, 496 U.S. ___, 110 S.Ct. 2404, 110 L.Ed.2d 287 (1990) 30
United States v. O'Brien, 391 U.S. 367 (1968) ... *passim*
United States v. Slepicoff, 524 F.2d 1244 (5th Cir. 1975), *cert. denied* 425 U.S. 998 (1976) 24
United States v. Twelve 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123 (1973) 26, 28
Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990) 26
Ward v. Rock Against Racism, 491 U.S. ___, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) 14, 38-40
Winters v. New York, 333 U.S. 507 (1948) 19, 28

Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977) 19

Constitutions, Statutes, and Rules (Current):

U.S. Const., amend. I ..... *passim*
U.S. Const., amend. XXI 4, 8
28 U.S.C. § 1254(1) 2
28 U.S.C. § 1343(a)(3) 4
28 U.S.C. § 2202 4
42 U.S.C. § 1983 4
Fed. R. Civ. P. 52(a) 15, 16
Ind. Code § 35-45-4-1 ..... *passim*
1976 Ind. Acts ch. 148, §§ 5, 24 29-30

Statutes No Longer In Force:

Ind. Code §35-1-83-3 (1971) 29
Ind. Code §10-2801 (Burns 1933 & 1956 Supp.) 29
Ind. Code §2567 (Burns 1926) 29
1905 Ind. Acts ch. 169, § 461 29
1881 Ind. Rev. Stat. § 1995 29
1879-1881 Ind. Acts ch. 37, § 90 29
1852 Ind. Rev. Stat. (1876 Rev.) pt. III, ch. 8, § 22 29
1852 Ind. Rev. Stat. pt. III, ch. 7, § 22 29
1843 Ind. Rev. Stat. ch. 53, § 81 29
1831 Ind. Rev. Stat. ch. 26, § 60 29

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The *en banc* decision of the Seventh Circuit is reported at 904 F.2d 1081 (Pet. App. 1-109). The vacated panel decision of the Seventh Circuit is reported at 887 F.2d 826 (Pet. App. 112-119). The decision of the district court on remand from the first appeal is reported at 695 F.Supp. 414 (Pet. App. 120-136).

The first decision of the Seventh Circuit remanding the case to the district court is reported at 802 F.2d 287 (Pet.

App. 140-147). The original decision of the district court granting a preliminary injunction on July 26, 1985, and its order making the injunction permanent on October 10, 1985, are not reported (Pet. App. 148-158).

JURISDICTION

The judgment to be reviewed was entered *en banc* on May 24, 1990. (J.A. 31.) No petition to rehear the *en banc* judgment was filed. An earlier panel judgment was entered on October 19, 1989, but was vacated by the order granting rehearing *en banc* on January 9, 1990 (Pet. App. 110-111).

This Court has jurisdiction to review the judgment pursuant to 28 U.S.C. § 1254(1). The petition for certiorari was filed on July 2, 1990, and was granted on October 1, 1990.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The state statute found unconstitutional by the Seventh Circuit, Ind. Code §35-45-4-1, provides in pertinent part:

> (a) A person who knowingly or intentionally, in a public place:
>
> (1) engages in sexual intercourse;
> (2) engages in deviate sexual conduct;
> (3) appears in a state of nudity; or
> (4) fondles the genitals of himself or another person;
>
> commits public indecency, a Class A misdemeanor.

> (b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

STATEMENT OF THE CASE

Divided by a vote of seven to four, the *en banc* Seventh Circuit held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1085 (7th Cir. 1990) *(en banc)* (Pet. App. 8). The majority further found Indiana's general public indecency statute, Ind. Code §35-45-4-1, to be unconstitutional as applied to such dancing, concluding that Indiana's "laudable concerns" in prohibiting public nude dancing were insufficient to justify a restriction on the expression involved therein. *Id.* at 1088-1089 (Pet. App. 14-16.)

Prior to this litigation, the Indiana Supreme Court held that Indiana's public indecency statute, Ind. Code §35-45-4-1, could constitutionally be used to convict nude barroom dancers. *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980). The court construed §35-45-4-1 to proscribe only conduct "traditionally . . . held to be public indecency," but not nudity "as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. Thus construed, the court found that the statute was not overbroad, and further that the nude barroom dancing at issue in the case was mere conduct without the expression of ideas. This Court dismissed appeals from the ruling for want of a substantial federal question. *Clark* and *Dove*, *supra*. The Indiana Supreme Court subsequently affirmed convictions of nude

dancers under the statute. E.g., *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984).

Filing of Cases and First Appeal. This litigation began with three separate actions filed in the district court in 1985.[1] Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson (the *Glen Theatre* plaintiffs) sued the City of South Bend, the city police chief, the county prosecutor, and the state attorney general. Darlene Miller and JR's Kitty Kat Lounge, Inc. (the *Miller* plaintiffs), and Sandy Diamond, Lynn Jacobs, 720 Corporation ("Ramona's Car Wash") and 726 Corporation ("Ace-Hi Lounge") (the *Diamond* plaintiffs), independently sued the above officials and the Indiana Alcoholic Beverage Commission. The plaintiffs sought injunctive relief prohibiting the defendants from enforcing Ind. Code §35-45-4-1 against them on the basis of nude dancing they wished to perform. They claimed that enforcement of the statute, requiring them to wear "pasties" and "g-strings" while dancing, would violate their right to freedom of speech under the First Amendment. It was undisputed that the defendant law enforcement officials had arrested and prosecuted nude dancers under §35-45-4-1, and would do so in the future.

In *Glen Theatre*, District Judge Allen Sharp granted a preliminary injunction against enforcement of the public indecency statute, finding it to be facially unconstitutional for overbreadth. (Pet. App. 149-158.) The injunction was made permanent on October 10, 1985. (Pet. App. 148.) In the *Miller* and *Diamond* cases, District Judge Robert L. Miller, Jr. denied preliminary injunctions after finding that the Twenty-first Amendment permitted the prohibition of nude dancing where alcoholic beverages were sold.

[1]The actions were filed under 28 U.S.C. § 1343(a)(3) (original action to redress deprivation of civil rights) and §2202 (declaratory judgment), and 42 U.S.C. § 1983 (civil rights).

The *Glen Theatre* defendants appealed, and the Seventh Circuit reversed the grant of injunctive relief. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140). The court found that this Court's dismissal of the appeals from *Baysinger, supra*, for want of a substantial federal question constituted an affirmance of *Baysinger's* holding that the statute was not overbroad. 802 F.2d at 288-290 (Pet. App. 142-146). The case was remanded to the district court for the plaintiffs to pursue their argument that the statute violated the First Amendment as applied to their nude dancing. *Id.* at 290 (Pet. App. 146). The district court was specifically instructed to "examine the plaintiffs' proffered evidence of the dancing they wish to perform" and decide whether "the activity should be afforded First Amendment protection." *Id.* at 291 (Pet. App. 147).

Proceedings and Findings on Remand. After remand the *Miller* and *Diamond* cases were transferred to Judge Sharp, who considered the cases jointly with *Glen Theatre*. The *Miller* and *Diamond* plaintiffs submitted a videotape of four nude dances as evidence of the dancing they wished to perform; the *Glen Theatre* plaintiffs relied only on a previously filed affidavit of Gayle Ann Marie Sutro. Based on the videotape and factual findings previously made in all three cases, the district court denied relief and entered judgment in favor of the defendants. *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414 (N.D. Ind. 1988) (Pet. App. 120-139). The district court made the following pertinent findings.

Glen Theatre, Inc. ran a business called the "Chippewa Bookstore" offering, among other things, booths with glass panels through which paying adults viewed nude women dancing on a stage. (J.A. 16.) No alcoholic beverages were sold or permitted in the "bookstore." (J.A. 15.) Plaintiff Gayle Ann Marie Sutro in her affidavit described her nude dancing as "an art form I consider to be artistic," and her dances as "appropriately choreographed and . . . an attempt

to communicate as well as entertain." (J.A. 14.) Sutro's appearance was scheduled in conjunction with the showing of one of her movies at the nearby Chippewa Drive-In. (J.A. 14.) As noted, the dancing at the "bookstore" was not represented on the videotape.

The Kitty Kat Lounge sold alcoholic beverages and offered nude "go-go" dancing. The district court described the testimony of plaintiff Darlene Miller at the Kitty Kat as follows:

> Ms. Miller sells drinks and dances at the Kitty Kat. She has worked at the Kitty Kat for about two years and currently makes $250.00 to $300.00 per week. When she dances, Ms. Miller perceives herself as "just entertaining, just dancing." The avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later. Ms. Miller dances "go-go," sometimes fast, sometimes slow. She dances to music from a juke box. Ms. Miller wants to dance nude because she believes she would make more money doing so; at present, she wears "pasties" and a "g-string" when she dances, for fear of arrest.

695 F.Supp. at 420 (Pet. App. 133).

The third and fourth dancers on the videotape were from the Kitty Kat Lounge.[2] The district court described it as follows:

> The performances are basically identical. They consist of a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing. Each dance ends with the dancer totally nude or nearly nude. The dances are done on a stage or on a bar and are not a part of any type of play or dramatic performance. They are simply what are commonly referred to as "striptease" acts.

[2]Copies of the videotape, showing the third and fourth dancers, have been filed with this Court as a Supplement to the Joint Appendix. The first two dancers and their employers, the *Diamond* plaintiffs, did not appeal from the district court's judgment, and are not before this Court.

695 F.Supp. at 416 (Pet. App. 124).

Based on this evidence, and in accordance with the Seventh Circuit's mandate, the district court found that "the type of dancing these plaintiffs wish to perform is not expressive activity protected by the Constitution of the United States." The court found the dances to be "mere conduct," describing them as "strip tease dances . . . not performed in any theatrical or dramatic context," and further noted that they fell squarely within Indiana's constitutional public indecency statute. 695 F.Supp. at 419 (Pet. App. 130).[3]

Second Appeal. Appeals were taken by the *Glen Theatre* and *Miller* plaintiffs. A panel of the Seventh Circuit[4] reversed the district court on October 19, 1989. The panel ignored the finding which the district court had been instructed to make on remand, and instead held as a matter of law that all non-obscene nude dancing performed for entertainment is "expressive activity" protected by the First Amendment. *Miller v. Civil City of South Bend*, 887 F.2d 826, 827 (7th Cir. 1989) (Pet. App. 112-113).

The state defendants (Barnes, Pearson, and the Indiana Alcoholic Beverage Commission) requested rehearing *en banc;* the Seventh Circuit granted rehearing *en banc* and vacated the panel decision on January 8, 1990. (Pet. App. 110-111.) On May 24, 1990, by a vote of seven to four, the Seventh Circuit again reversed the district court, and enjoined the defendant officials from enforcing the public indecency statute against the plaintiff businesses and danc-

[3]The district court originally found the action to be moot as to the *Glen Theatre* plaintiffs, based on information that their business had been destroyed by fire. 695 F.Supp. at 416 (Pet. App. 124.) Pursuant to a post-judgment motion, however, the district court found that the case was not moot, and made the judgment effective as to the *Glen Theatre* plaintiffs as well. (Pet. App. 136-139.)

[4]The opinion was authored by Judge Flaum and joined by Judges Wood and Coffey.

ers. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) *(en banc)* (Pet. App. 1 et seq.; judgment at J.A. 31).

The majority held that, "as a matter of law, non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." 904 F.2d at 1085 (Pet. App. 8.) The majority found that the plaintiffs' nude dancing communicated an "emotional" theme of "eroticism and sensuality," 904 F.2d at 1086-1087 (Pet. App. 11), and that the district court's finding of no expression in the dances was "clearly erroneous," *id.* at 1087 n. 5 (Pet. App. 11 n. 5).

The majority further concluded that Indiana's public indecency statute was not a valid restriction on nude barroom dancing, despite the State's "laudable concerns" of protecting public morality in general and family structure in particular. The court found the statute to be "*directly* related to the suppression of free expression" (emphasis in original). The court held, however, that Indiana could regulate the presentation of nude dancing with reasonable time, place and manner restrictions, such as banning nude dancing "in settings such as streets, parks and beaches;" could regulate the conduct for reasons unrelated to the suppression of speech under *United States v. O'Brien*, 391 U.S. 367 (1968); and could regulate nude dancing under the Twenty-first Amendment. 904 F.2d at 1088-1089 & n. 7 (Pet. App. 14-16.)

In dissent, Judge Easterbrook, joined *in toto* by Judges Kanne and Manion and in part by Judge Coffey, found that (1) Indiana's public indecency statute, as a regulation of conduct unrelated to expression, could be constitutionally applied to nude barroom dancing regardless of whether such dancing is speech; and (2) in any event, the nude dancing at issue was not "speech". 904 F.2d at 1120-1131 (Pet. App. 78-100). Judge Coffey joined the first conclusion, and also found that Indiana's legitimate interests in regulating public nudity in general and nude barroom dancing in

particular justified the State's restriction, and that the regulation was a reasonable "manner" restriction on the dancing. 904 F.2d at 1104-1120 (Pet. App. 48-78). Judge Manion, joined by Judges Coffey and Easterbrook, found that (1) the district court properly found that the nude dancing at issue contained no "expressive activity" protected by the First Amendment; and (2) even if expressive, the dancing could be regulated by Indiana's content-neutral statute because the State's interests in preventing public indecency and immorality outweigh any limited First Amendment interest in performing stripteases in bars. 904 F.2d at 1131-1135 (Pet. App. 101-109).

SUMMARY OF ARGUMENT

I. In determining whether conduct is "speech", the Court has used a three-part test to determine whether particular conduct possesses sufficient "communicative elements" to bring it within the Free Speech Clause: (1) Intent to convey (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 2539, 105 L.Ed.2d 342 (1989); *Spence v. Washington*, 418 U.S. 405, 410 (1974). Applying this test to the nude barroom dancing in this case, it is clear that the Seventh Circuit erred in finding the dancing to be protected "speech" as a matter of law.

Evidence that the dancers intended to communicate was absent. Plaintiff Miller stated that the purpose of her dance was simply to get customers to buy drinks. Plaintiff Sutro claimed that she intended to communicate, but she was unable to articulate any "particularized message." There was no claim whatsoever that a reasonable person viewing the dances would be likely to understand a message. Review of the videotape submitted by the *Miller* plaintiffs confirms that the dancing is empty of any sort of element of

communication, and conduct which does not communicate is not "speech".

The plaintiffs' assertion that the First Amendment protects their dancing because it "entertains" must be rejected, because it would overextend the Amendment to activities (such as bullfighting or circus acts) which have no relation to the need for freedom of speech. The majority below did not adopt a "freedom to entertain," but chose instead to supply a message in the dancing that even the dancers did not assert: an "emotional theme of eroticism and sensuality." This approach is inconsistent with the three-part test set forth above, because it ignores the lack of proof of intent, and because an "emotional theme" is not sufficiently particularized to be "speech".

Works of art are not at risk in this case. Indiana's public indecency statute applies only to live conduct, not books, paintings, or movies. Artistic conduct such as ballet communicates an artistic message (regardless of whether it is bad art or good art) which distinguishes it from the aimless wanderings of nude barroom dancers. The determination of "artistic content" is much like the issue of whether a work lacks serious artistic value in obscenity cases. A precise line need not be drawn in any event, as the majority below conceded that the dancing in this case was "lacking in artistic value." 904 F.2d at 1087 (Pet. App. 12). But the distinction must be recognized, lest the First Amendment be trivialized by including within its protection conduct which is clearly devoid of artistic content.

II. Even assuming *arguendo* that the plaintiffs' erotic dancing is "speech", Indiana's requirement that minimal clothing be worn in public (whether one is dancing or not) may be validly applied to the nude barroom dancing in this case. The public indecency statute, which has roots in common law and a history which far predates barroom nude dancing, is content-neutral — it applies equally to all public nudity regardless of the viewpoint that such conduct might

express. Under any of three possible characterizations of the statute for First Amendment purposes, therefore, the law may be constitutionally applied even to dancing which is "speech".

First, the statute is valid as a general criminal prohibition, and conduct which violates the statute cannot be excused on the ground that the conduct is expressive. For the same reason that an assassin cannot be excused from the operation of a murder statute on the ground that the killing sent a political message, a dancer cannot be excused from the operation of a content-neutral public indecency law on the ground that the dance is expressive. The Court held last Term that Native Americans could be penalized for illegal drug use, even where they claimed that the use of peyote was an essential religious practice. *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). As in *Smith*, the Court in this case should not engage in any kind of "balancing of interests" to determine the validity of a general criminal proscription.

Second, the statute is valid under the four-part test for regulations of conduct which incidentally infringe on speech, set out in *United States v. O'Brien*, 391 U.S. 367 (1968). The State clearly has the constitutional power to require public decency, and it has "important or substantial . . . interest[s]" in prohibiting public nudity, including nude barroom dancing. Such activity encourages breakdown of the family structure, degradation of women, prostitution, sexual assaults, and other criminal activity. These interests are "unrelated to the suppression of free expression," and the statute's *de minimis* clothing requirement is no greater than necessary to further these interests.

Third, the requirement that certain portions of the body be covered in public is a reasonable "manner" restriction on erotic barroom dancing, an analysis that is practically identical to the *O'Brien* test. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 298 & n. 8 (1984). The

prohibition on nudity is a limitation on the *manner* in which dance (or any other public activity) is performed. The restriction is "justified without reference to the content of the regulated speech" as it is viewpoint-neutral, and the nudity ban is sufficiently tailored to serve the State's interests in public decency. The statute does not unreasonably burden speech or limit alternative avenues for communication, as none of the dancers claimed that nudity *per se* was essential to any message supposedly sent by their dancing.

ARGUMENT

I. THE NUDE DANCING OF THE PLAINTIFFS IN THIS CASE IS NOT "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT.

The district court in this case made a factual finding that the nude barroom dancing which the plaintiffs wished to perform was not "expressive activity" protected by the First Amendment. 695 F.Supp. at 419 (Pet. App. 130). The Seventh Circuit majority, on the other hand, found the dancing at issue to be "expressive" as a matter of law, although it also found the district court's conclusion to be "clearly erroneous." 904 F.2d at 1085, 1087 n. 5 (Pet. App. 8, 11 n. 5). The Seventh Circuit failed to recognize the factual nature of the determination of whether conduct is "speech" under the First Amendment, and reached the wrong conclusion on this record. Part A discusses the three-part factual test for "speech" which this Court has established, and Part B discusses the application of the test to the evidence in this case.

A. Whether Conduct is "Speech" is a Factual Inquiry Based on Intent and the Presence of a Reasonably Perceivable, Particularized Message.

It is beyond dispute that nonverbal conduct can be "speech," although this Court's precedents deal largely with conduct which expressed an apparently political message. As early as 1931, the Court reversed on First Amendment grounds a conviction of displaying a red flag as a sign of opposition to the government, *Stromberg v. California*, 283 U.S. 359 (1931), and since then has found other forms of conduct to be speech. See, e.g., *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (flag burning); *Spence v. Washington*, 418 U.S. 405 (1974) (exhibition of flag with peace symbol affixed to surfaces); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (wearing of black armbands); *United States v. O'Brien*, 391 U.S. 367 (1968) (burning of draft card assumed *arguendo* to be "speech").

The Court, however, has "rejected 'the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.'" *Texas v. Johnson*, 491 U.S. at ____, 109 S.Ct. at 2539, quoting *O'Brien*, 391 U.S. at 376. For example, in assessing whether recreational social dancing is a form of expressive activity protected by the First Amendment, the Court recognized that

> [i]t is possible to find some kernel of expression in almost every activity a person undertakes — for example, walking down the street, or meeting one's friends at a shopping mall — but such a kernel is not sufficient to bring the activity within the protection of the First Amendment.

City of Dallas v. Stanglin, 490 U.S. 19, ____, 109 S.Ct. 1591, 1595, 104 L.Ed.2d 18 (1989).

The Court has therefore used a workable test for determining when conduct becomes "speech", which was summarized in *Texas v. Johnson:*

> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

491 U.S. at ____, 109 S.Ct. at 2539, quoting *Spence*, *supra*, 418 U.S. at 410-411. This test can be divided into three elements: (1) intent to convey (2) a particularized message, and (3) a great likelihood that the message will be understood by viewers. The ultimate question the test seeks to answer is the extent to which the conduct possesses "communicative elements."

The focus on "communication" is natural and necessary, lest the First Amendment be expanded to protect actions (verbal or nonverbal) which have no meaning. Even outside the context of "political" conduct, therefore, the Court has consistently stressed communication as key in determining whether conduct is "speech." Motion pictures, for example, are protected as "a significant medium for the *communication* of ideas." *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952) (emphasis added). Theater productions such as *Hair* are protected, as "theater usually is the acting out — or singing out — of the written word." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 557-558 (1975). "Music, as a form of expression *and communication*, is protected under the First Amendment." *Ward v. Rock Against Racism*, 491 U.S. ____, ____, 109 S.Ct. 2746, 2753, 105 L.Ed.2d 661 (1989) (emphasis added).

The need for communication to turn mere conduct into "speech" gives life to the second element of the test quoted above, a "particularized message." Obviously the "message" need not be so specific that it can be copied in words, complete with punctuation. But the "particulars" of the message must at least be in commonly understood terms. While First Amendment decisions often refer to "expression," the term is always used in the narrow sense of expressing a message, not in the broader sense of being emotionally "expressive." Otherwise, as Judge Easterbrook pointed out in dissent, the First Amendment would protect all conduct because all conduct expresses some emotion. 904 F.2d at 1124-1125 (Pet. App. 87-89).

The test, and especially the elements of intent of the actor and perception of the audience, is clearly factual in nature. The majority below implicitly acknowledged as much by holding

that the district court's finding was "clearly erroneous," 904 F.2d at 1087 n. 5 (Pet. App. 11), apparently under Fed. R. Civ. P. 52(a)'s standard for review of findings of fact. Intent is ordinarily a matter of credibility, as the only direct evidence of intent is usually the assertion of the person who engaged in the conduct. This Court has expressly relied on and implicitly accredited the testimony of those whose conduct was at issue under the First Amendment. *Texas v. Johnson*, 491 U.S. at ____, 109 S.Ct. at 2540; *Spence*, 418 U.S. at 407-408. But the issue is primarily a function of triers of fact, who are better able to assess the credibility of self-serving claims that otherwise criminal conduct was intended to communicate a message.

Equally factual is the question of the likelihood that the intended message would be understood by others, which depends on whether a reasonable person would have perceived the message intended by the actor under the circumstances. In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294 (1984), the Court asked whether the conduct "would *reasonably* be understood by the viewer to be communicative" (emphasis added). Again, this determination is better made in the first instance by trial judges and juries in particular cases. This is especially true because "the context in which a symbol is used for purposes of expression is important, for the context may give meaning to the symbol." *Spence*, *supra*, 418 U.S. at 410.

Of course, in the area of First Amendment claims, appellate courts have a duty to "make an independent examination of the whole record," even in federal cases controlled by Rule 52(a), *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984); and jury verdicts on issues such as whether a work is "patently offensive" are not preclusive, *Jenkins v. Georgia*, 418 U.S. 153, 160 (1974). However, the factual nature of the three-part test counsels deference at least to findings of historical or subsidiary fact, particularly where issues of credibility and context are involved.

Finally, the burden of proving that conduct is "speech" falls squarely on the proponent.

> Although it is common to place the burden upon the Government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to it.

Clark v. CCNV, supra, 468 U.S. at 293 n. 5.

B. The Nude Barroom Dancing Proffered by the Plaintiffs in this Case is Not "Speech," As it Lacks any Element of Communication.

1. *The dancing in this case lacks sufficient communicative elements to qualify as "speech".* The district court made a factual finding in this case that the nude dancing which the plaintiffs wished to perform "is not expressive activity." 695 F.Supp. at 419 (Pet. App. 130). A factual finding can be overturned on appeal only if "clearly erroneous," Fed. R. Civ. P. 52(a), although as noted above independent appellate review is appropriate in First Amendment cases. Regardless of the standard used, however, application of the three-part test discussed above demonstrates that the nude dancing at issue does not possess "sufficient communicative elements" to rise to the level of "speech" protected by the First Amendment.

Intent to communicate is wholly lacking, especially from the evidence submitted by the *Miller* plaintiffs, who never claimed any such intent. Instead, Darlene Miller stated that the purpose of her dancing was "to try to get customers to like her so that they will buy more drinks later," and that she wanted to dance nude to "make more money." 695 F.Supp. at 420 (Pet. App. 133). Without intent to communicate a message, there

cannot be a particularized message (the second element) that is understandable by others (the third).

A review of the two nude dances submitted as evidence by the *Miller* plaintiffs[5] confirms the absence of communication. The women on the tape do nothing more than gradually disrobe while dancing in common freestyle fashion, "with vigor but without accomplishment" according to one judge, 904 F.2d at 1091 (Posner, J. concurring) (Pet. App. 19). The dances are empty of any sort of message, much less a "particularized message." As Miller herself said, the dancing is "just entertaining, just dancing." 695 F.Supp. at 420 (Pet. App. 133).

The *Glen Theatre* plaintiffs, and Gayle Sutro in particular, claimed in conclusory fashion "an intent to communicate as well as to entertain." (J.A. 14.) But unlike Harold Spence in *Spence v. Washington, supra*, or Gregory Johnson in *Texas v. Johnson, supra*, Sutro never revealed *what* she wanted to communicate to the men in booths watching her through glass panels. Like Darlene Miller, Sutro's dancing apparently had at least a commercial purpose, since her appearance was designed to promote one of her movies that was playing at a nearby drive-in theater. (J.A. 14.)

Even assuming a good faith intent to communicate something, Glen Theatre and Sutro failed to provide evidence that her communication could be understood by a reasonable audience. Despite the direction of the Seventh Circuit in the first appeal that the district court examine "evidence of the dancing [the plaintiffs] wish to perform," 802 F.2d at 291 (Pet. App. 147), the *Glen Theatre* plaintiffs offered no videotape or other descriptive evidence. Thus there was a complete lack of

---

[5]A single tape of four dances was jointly submitted by the *Diamond* and *Miller* plaintiffs. The third and fourth dancers represented the dancing of the *Miller* plaintiffs, and the copies submitted to this Court with the Joint Appendix contain only those dances. The *Diamond* plaintiffs did not appeal from the district court.

proof on their part that would support a finding of "communicative elements" protected by the First Amendment.[6]

Finally, none of the plaintiffs claimed that the *nudity* of the dancers communicated anything different or more than the dances themselves. The Indiana law at issue, as enforced, allows the plaintiffs to perform their dances with "pasties" covering the dancers' nipples and "g-strings" covering their pubic areas and buttocks. It is difficult to imagine that any "message" communicated by naked women dancing on a bar or stage would be perceived any differently when performed with the scanty attire permitted by the statute.

2. *Nude barroom dancing is not "speech" simply because it entertains, or on the basis of the "emotional theme" found by the majority below.* Throughout this litigation the plaintiffs, and ultimately the Seventh Circuit majority, have attempted to bring nude barroom dancing within the First Amendment by misapplying or avoiding altogether the three-part test for communicative elements set forth above. These attempts demonstrate the need for continuing to strictly require a showing of communicative elements.

The plaintiffs argued below that their nude dancing is protected simply because it is "entertainment," an argument accepted by none of the Seventh Circuit judges, and for good reason. Holding that the First Amendment protects any conduct that a reasonable person might find entertaining would expand the Amendment indefinitely and infinitely; the word "speech" would become meaningless. The new "freedom to entertain" would encompass not only "sports" such as bullfighting, bearbaiting, and cockfighting; it would extend as well to messageless (but possibly entertaining) activities such as professional sports, circus acts, beauty pageants, or standing

[6]The State argued below that the *Glen Theatre* plaintiffs waived their contentions by failing to submit proof. The panel decision rejected this argument in a footnote, 887 F.2d at 829 n. 3 (Pet. App. 117), and the waiver claim was not addressed by the *en banc* majority.

nude on a public beach. Such an expansion of the Amendment would not serve any conceivable policy behind allowing freedom of speech.

The plaintiffs relied below on *dicta* in two cases, *Winters v. New York*, 333 U.S. 507 (1948), and *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977). In *Winters* the Court reversed a conviction of possession with intent to sell magazines containing "criminal news, police reports, and accounts of criminal deeds." The Court held such printed materials to be within the First Amendment's freedom of the press (not freedom of speech), rejecting the suggestion that free press protection extends only to the "exposition of ideas" because "[t]he line between the informing and the entertaining is too elusive. . . ." 333 U.S. at 510. It is obvious, however, that *printed* matter "communicates" regardless of whether it posits ideas or merely entertains It is equally obvious that noncommunicative *conduct* is not "speech" solely because it entertains, and *Winters* did not so hold.

The human cannonball in *Zacchini* did not claim that his performance was protected "speech." Instead, he claimed a proprietary interest in his performance based on state law, and the Court agreed that a local television station's free *press* privilege did not allow the station to film and broadcast the entire performance without compensating Zacchini. Therefore the Court's statement that "entertainment, as well as news, enjoys First Amendment protection," 433 U.S. at 578, was not dispositive of any issue before the Court, and cannot be deemed a definitive holding that all entertainment is protected "speech."

The Seventh Circuit majority chose instead to supply a message that was not asserted by any of the plaintiffs:

> The dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality.
>
> * * *

> As stated above, dance as entertainment inherently embodies the expression and communication of ideas and emotions. . . . Nude barroom dancing, though lacking in artistic value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless.

904 F.2d at 1086-1087 (Pet. App. 11-12) (footnote omitted). With reference to the three-part test discussed in Part A above, however, this conclusion is erroneous for several reasons.

Most obviously it discards the element of intent by finding a "message" that the dancers themselves did not intend to express. "An act not intended to be communicative does not acquire the stature of First-Amendment-protected expression merely because someone, upon learning of the act, might derive some message from it." *Redgrave v. Boston Symphony Orchestra, Inc.*, 855 F.2d 888, 895 (1st Cir. 1988), *cert. denied* ____ U.S. ____, 109 S.Ct. 869, 102 L.Ed.2d 993 (1989). In this case, the *Miller* plaintiffs intended by their dancing only to sell drinks and "entertain"; the *Glen Theatre* plaintiffs asserted a general intent to communicate, but could not specify any message. Court-supplied intent expands "speech" as far as the imaginations of judges will allow.

> Even in a quantum-mechanical universe there are reasons, and clever observers can infer messages having nothing to do with the id and the superego. A driver doing 90 in a school zone makes an implicit proposal to change the speeding laws, or comments on the dominance of man over machine, or declaims the low value of children's lives, or advertises the capabilities of the car. So too we attribute to nude dancing a belief in the value of Eros, or a retelling of the Genesis story, or a burst of lustful emotion.

Miller (en banc), supra, 904 F.2d at 1129 (Easterbrook, J. dissenting) (Pet. App. 96).

Second, the "emotional theme" discovered by the Seventh Circuit majority falls far short of the "particularized message" protected by the First Amendment. As noted above, the Amendment cannot be stretched so far as to protect all conduct which expresses emotion, because it is "possible to find some kernel of expression in almost every activity a person undertakes." *Stanglin, supra*, 490 U.S. at ____, 109 S.Ct. at 1595.

No doubt *some* dance is communicative, and the majority below correctly noted its cultural roots. 904 F.2d at 1085-1086 (Pet. App. 8-10). But the majority's encyclopedic definition of dancing was "the art of moving the body in a rhythmical way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." *Id.* at 1085 (Pet. App. 9), quoting 16 The New Encyclopedia Britannica 935 (1989). From the body language of a beckoning prostitute to the "organized flasher" suggested by Judge Easterbrook in dissent, 904 F.2d at 1126 (Pet. App. 91), such a definition would grant First Amendment "speech" protection to any rhythmic movement which expresses an "emotional theme" of "eroticism and sensuality."

In his concurring opinion, Judge Posner attempted to distinguish between emotional expression that is protected and that which is not. He drew a distinction between two behaviors, kicking a wastebasket in anger and planting geraniums in a windowbox, both "expressive" of an inner mental state.

> But the expression that is relevant to freedom of speech, and absent when the wastebasket is kicked in private, is the expression of a thought, sensation, or emotion *to another person*. This is a narrower concept of expression than the first but it is of course enormously broad, encompassing not only the geranium example but the whole field of human communication, verbal or nonverbal. We communicate with each

another by dress, grooming, deportment, and gestures, as well as by words.

904 F.2d at 1092 (Posner, J. concurring) (Pet. App. 22) (emphasis in original). Under this analysis the First Amendment would not only protect planting flowers, grooming, or deportment; apparently it would also protect kicking a wastebasket *in public*. Judge Posner conceded that social dancing is not protected, as he must after *Stanglin*, *supra*, but there is no principled explanation for protecting public flower transplantation but not public social dancing.

The requirement of a particularized message perceivable by others excludes all of these examples, as well as barroom nude dancing, from First Amendment protection. Of course, if one kicks a wastebasket on which is displayed a picture of a public official, or plants geraniums during a time of public clamor over a windowbox ordinance, the context in either case would suggest a message that reasonable viewers would understand. But such acts in a context which suggests only a generalized emotion of anger, or an intent to beautify one's home, do not communicate in a sufficiently specific way to qualify as "speech" under the First Amendment. For the same reason, neither does a nude dance whose only message is an "emotional theme" of "eroticism and sensuality" qualify as "speech".

3. *The First Amendment does not protect the nude dancing in this case on the basis of artistic content.* The denial of First Amendment protection to the nude barroom dancing at issue in this case will not threaten the protection afforded to works of art, including music, theater, and ballet. This concern was prominent in the Seventh Circuit majority opinion, 904 F.2d at 1086, 1087 (Pet. App. 10, 11-12), and Judge Posner's concurrence, *id.* at 1093-1096 (Pet. App. 24-31). Concern was also expressed that attempts to distinguish "high" art from "low" entertainment, or to differentiate on the basis of perceived sophistication, are

untenable. 904 F.2d at 1086 (majority), 1089 n. 1 (Cudahy, J. concurring) (Pet. App. 10, 16). These concerns are misplaced.

Much of the art discussed by Judge Posner in particular, such as paintings or prints, as well as films and music, is readily distinguishable from live nude dancing because such art, whether representational or abstract, is not *conduct*. This is an important distinction in this case for two reasons. First, the statute under attack, Ind. Code § 35-45-4-1, prohibits only *live* appearances in the nude, not displays of pictures or films containing nudity. Second, the Court has always recognized that the protection of the First Amendment decreases "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes. . . ." *California v. LaRue*, 409 U.S. 109, 117 (1972); see also *Miller v. California*, 413 U.S. 15, 26 n. 8 (1973) (States have "greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior"). As the Court noted in *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975),

> [s]cenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. [Citations.] In this respect such nudity is distinguishable from the kind of public nudity traditionally subject to indecent-exposure laws. See *Roth v. United States*, 354 U.S. 476, 512 (1957) (Douglas, J. dissenting) ("No one would suggest that the First Amendment permits nudity in public places").[7]

[7] In *Roth* Justice Douglas, joined by Justice Black, opined that even obscene speech is protected by the First Amendment. But that opinion was qualified when it came to conduct: "I assume there is nothing in the Constitution which forbids Congress from using its power over the mails to proscribe *conduct* on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places, adultery, and other phases of sexual misconduct." 354 U.S. at 512 (1957) (Douglas, J. joined by Black, J. dissenting) (emphasis in original).

Art which largely consists of conduct (such as ballet) can be distinguished from nude barroom dancing because the former expresses an artistic message. Choreography in such instances is carefully planned and executed to tell a story or communicate artistically. The aimless wandering of a naked barroom dancer, on the other hand, does nothing more than arouse sexual urges and sell drinks. Its status as "speech" does not depend on whether it is "bad art" or "good art," for it has no artistic content at all.

There is no reason that state trial and appellate courts would be unable to determine whether a particular nude dance is devoid of artistic content. Essentially the same determination is made in obscenity cases, where one question is "whether the work, taken as a whole, lacks serious literary, *artistic*, political, or scientific value." *Miller v. California*, *supra*, 413 U.S. at 24 (emphasis added). The ability of trial judges and juries to assess whether "a reasonable person would find such value in the material, taken as a whole" was reaffirmed in *Pope v. Illinois*, 481 U.S. 497, 500-501 (1987). Expert witnesses or other evidence can be considered in making this assessment. *Hamling v. United States*, 418 U.S. 87, 108, 125, 127 (1974) (expert witnesses permissible in obscenity prosecution, parties entitled to adduce relevant evidence on issues as in any other case); *Jenkins v. Georgia*, *supra*, 418 U.S. at 158-159 (1974) (relying on critical commentary and awards to assess whether movie was "patently offensive"); *United States v. Slepicoff*, 524 F.2d 1244, 1247-1248 (5th Cir. 1975), *cert. denied* 425 U.S. 998 (1976) (use of experts on issue of redeeming social value in pre-*Miller* case).

Distinguishing between the First Amendment rights of ballet dancers and nude "go-go" dancers is also easier when the crucial role of "context" (taking the "work as a whole") is emphasized. See *Spence*, *supra*, 418 U.S. at 410 (context of activity is important, "for the context may give meaning to the symbol"). A nude "ballet" dance on the bar at the

Kitty Kat Lounge may not be protected, while a "go-go" dance in the course of a protected theater production such as *Hair* or *Oh! Calcutta* might qualify as "speech". The Indiana Supreme Court recognized as much in holding that §35-45-4-1 cannot and does not prohibit "some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980).

A precise line between conduct with and without artistic content need not be drawn in this case, for it is apparent that the nude dancing at issue here falls on the "nonart" side of any line that might be drawn. The Seventh Circuit majority noted that the dancing in this case was "lacking in artistic value." 904 F.2d at 1087 (Pet. App. 12). One of the concurring opinions stated that the dances on the videotape were performed "with vigor but without accomplishment," 904 F.2d at 1091 (Posner, J. concurring) (Pet. App. 19); the same judge in another case described topless dancing as "artless." *Douglass v. Hustler Magazine, Inc.*, 769 F.2d 1128, 1141 (7th Cir. 1985) (dictum), *cert. denied* 475 U.S. 1094 (1986). None of the *Miller* plaintiffs claimed protection on the basis of artistic content, and the conclusory assertion of plaintiff Sutro that her dancing "is an art form I consider to be artistic" (J.A. 14) is an insufficient basis for so finding. And even Sutro made no claim that the *nudity* in her assertedly "artistic" dancing was itself artistic.

To hold that nude barroom dancing must be protected in all events, due to the difficulty in drawing the line between art and nonart, would be an abdication of judicial responsibility. This Court has long acknowledged the danger that rights can "declare themselves absolute to their logical extreme." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 355 (1908).

The seductive plausibility of single steps in a chain of

> evolutionary development of a legal rule is often not perceived until a third, fourth, or fifth "logical" extension occurs. Each step, when taken, appeared a reasonable step in relation to that which preceded it, although the aggregate or end result is one that would never have been seriously considered in the first instance. This kind of gestative propensity calls for the "line drawing" familiar in the judicial, as in the legislative process: "thus far but not beyond."

Walker v. City of Kansas City, 911 F.2d 80, 87 (8th Cir. 1990) (plurality), quoting *United States v. Twelve 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 127 (1973) (footnote omitted). For this reason, the Court should resist the temptation to stretch the First Amendment umbrella over all non-obscene nude dancing simply because it may not be as easy in other cases as it is in this case to identify conduct which is wholly lacking in communicative elements, be it artistic, political, or otherwise.

II. EVEN IF BARROOM EROTIC DANCING IS "SPEECH", INDIANA'S PUBLIC INDECENCY STATUTE IS VALID AS APPLIED TO SUCH DANCING.

Assuming *arguendo* that the erotic *dancing* (nude or not) of the plaintiffs is "expressive" and therefore entitled to some protection as speech under the First Amendment, Indiana's public indecency law is valid as applied to such dancing. At the root of this argument is the fact that the statute does not ban dancing, or even erotic dance or conduct. It simply requires that persons who appear in public places, whether dancing or not, cover their genitals, buttocks, and (in the case of females) nipples.

Depending on how this restriction is characterized, the First Amendment analysis of its application to barroom dancing may differ under this Court's precedents. Three characterizations are possible: (1) The ban on pubic nudity is a general, content-neutral criminal proscription that cannot be avoided simply

because the actor claims that his or her illegal conduct is "speech".[8] (2) The ban on public nudity has an incidental impact on any expression involved in erotic dancing, but is valid because it furthers substantial governmental interests unrelated to suppression of free expression.[9] (3) The ban on public nudity is a reasonable "manner" restriction on erotic dancing.[10]

Under any of these characterizations the statute is valid as applied. However, a threshold determination must be made that the statute is "content-neutral" or "viewpoint-neutral"; that is, that its application does not turn on whether the government disagrees with the message expressed. *City Counsel of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). After establishing that Ind. Code §35-45-4-1 is content-neutral in this respect in Part A, the following sections will show that the statute is valid as applied to barroom erotic dancing regardless of how that application is characterized.

A. The Language and History of the Statute Show That it is Content-Neutral.

In *United States v. O'Brien*, 391 U.S. 367 (1968), the statute prohibiting destruction of draft cards did "not distinguish between public and private destruction, and [did] not punish only destruction engaged in for the purpose of expressing views." *Id.* at 375. The Court found that the statute served important governmental interests "unrelated to the suppression of free expression," *id.* at 377; and distinguished it from a flag statute "aimed at suppressing communication," *id.* at 382. In *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989), the Court stated that while the government has a freer hand in restricting expressive conduct as opposed to written or spoken speech, it

> may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the

[8] See *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990).
[9] See *United States v. O'Brien*, 391 U.S. 367 (1968).
[10] See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

> more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."

491 U.S. at ____, 109 S.Ct. at 2540, quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J. dissenting), *rev'd sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984) (emphasis in original).

Examples of content-neutral restrictions, in addition to the draft card destruction statute in *O'Brien*, include antitrust laws which restrict otherwise protected boycotts, *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. ____, ____, 110 S.Ct. 768, 778-779, 107 L.Ed.2d 851 (1990); a "bar letter" forbidding entry to a military installation for security reasons even for a peaceful protest, *United States v. Albertini*, 472 U.S. 675, 687-688 (1985); and a prohibition of camping in certain parks which results in a ban on "sleep-in" protests, *Clark v. CCNV*, *supra*, 468 U.S. at 295.

Even though Indiana does not record legislative proceedings which might indicate legislative intent, the history of the crime of public indecency is strong evidence that the statute was not intended to discriminate on the basis of viewpoint. The common law roots of the offense of "gross and open indecency" were recognized by this Court in *Winters v. New York*, 333 U.S. 507, 515 (1948). The first public indecency case may have been *Sir Charles Sydlyes Case*, 83 Eng. Rep. 1146-1147 (K.B. 1663), in which the defendant was fined for "shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Convent Garden." *United States v. Twelve 200-Ft. Reels of Super 8 mm. Film*, 413 U.S. 123, 134 (1973) (Douglas, J. dissenting). See also *City Court of City of Tucson v. Lee*, 16 Ariz. App. 449, 494 P.2d 54, 57 (1972) (crime considered *malum*

in se at common law); *Noblett v. Commonwealth*, 194 Va. 241, 72 S.E.2d 241, 243-244 (1952).

The history of Indiana's public indecency statute shows that it far predates barroom nude dancing and was enacted as a general prohibition on public nudity. At least as early as 1831 Indiana had a statute punishing "open and notorious lewdness, or . . . any grossly scandalous and public indecency." 1831 Ind. Rev. Stat. ch. 26, § 60; 1843 Ind. Rev. Stat. ch. 53, §81. By 1852 it had been shortened to "notorious lewdness, or other public indecency," 1852 Ind. Rev. Stat. pt. III, ch. 7, §22. However, the undefined phrase "public indecency" was found to be too vague to state a crime. *Jennings v. State*, 16 Ind. 335 (1861). By 1876 the statute was revised to punish every person who "shall be guilty of notorious lewdness, or who shall, in any public place, make any uncovered and indecent exposure of his or their person." 1852 Ind. Rev. Stat. (1876 Rev.) pt. III, ch. 8, §22.

A brief gap in the statutory history was filled by the Indiana Supreme Court in *Ardery v. State*, 56 Ind. 328 (1877), which held that even though there was no public indecency statute in force at the time, the court could sustain a conviction of exhibition of "privates" in the presence of others. The court traced the offense to Adam and Eve, *id.* at 329-330. Four years later a statute was enacted that would remain essentially unchanged for nearly a century:

> Whoever, being over fourteen years of age, makes an indecent exposure of his person in a public place, or in any place where there are other persons to be offended or annoyed thereby, . . . is guilty of public indecency. . . .

1879-1881 Ind. Acts ch. 37, §90; 1881 Ind. Rev. Stat. §1995. The same statute was re-enacted in 1905, and the language quoted above remained unchanged until it was simultaneously repealed and replaced with the present statute in 1976.[11] 1976

[11] 1905 Ind. Acts ch. 169, §461. The statute was most recently codified as Ind. Code §35-1-83-3 (1971), and in earlier compilations was §10-2801 (Burns 1933 & 1956 Supp.) and §2567 (Burns 1926).

Ind. Acts ch. 148, §§5,24.

In addition to the Indiana statute's history of neutrality in proscribing public nudity of all kinds, the statute's "precise language" also indicates a lack of viewpoint bias. Unlike the flag protection statute at issue in *United States v. Eichman*, 496 U.S. ____, ____, 110 S.Ct. 2404, 2409, 110 L.Ed.2d 287 (1990), which was found to focus on acts disrespectful to the flag, the language of Indiana's public indecency statute is clearly neutral. The statute by its own terms bans *all* nudity in public, along with public displays of sexual intercourse, deviate sexual conduct, or fondling. There is nothing in the statute to suggest that it is directed only at such conduct which expresses a message at all, much less a message with which the State of Indiana disagrees.

Based on the history and language of Indiana's public indecency statute, therefore, it is difficult to understand how the statute could be found to be "aimed at" or "related to the suppression of" speech, unless the Court accepts the view that nudity by itself is expressive "speech" (which even the majority below did not do). The statute by its terms casts an dispassionate eye upon flashers, streakers, nude sunbathers, those who wish to stroll or dance naked down the street, or nudity combined with protected political activity. The woman who dances nude in a bar is treated the same as the woman who sheds her blouse to protest the exploitation of women in bars, without respect to the viewpoints expressed. See *Craft v. Hodel*, 683 F.Supp. 289, 296 (D. Mass. 1988) (women engaged in topless protest opposing "pornography and the exploitation of women"); cf. *South Florida Free Beaches v. City of Miami*, 734 F.2d 608, 609 (11th Cir. 1984) (nude sunbathers claimed message that "the human body is wholesome and that nudity is not indecent"). Moreover, the Indiana Supreme Court has construed the statute so as to limit its scope as applied to "some larger form of expression meriting protection, when the commu-

nication of ideas is involved." *Baysinger, supra*, 397 N.E.2d at 587.

The Seventh Circuit majority erred in finding the statute to be a "ban on nude dancing" which was enacted for "the preservation of a particular set of views; those reflecting the Indiana legislature's view of 'public morality.'" Therefore, the majority reasoned, the statute was directly related to the suppression of the dancers' "contrary" message of eroticism. 904 F.2d at 1088 & n. 7 (Pet. App. 14-15). This is a remarkably narrow view of legislative intent behind a statute for which there is no recorded legislative history, *id.*, particularly where the statute's plain words so broadly include all public nudity and public sexual activity, and where the statute has roots far predating the notion of nude barroom dancing for entertainment.

In lieu of considering the scope of the statute and its history set out above, the Seventh Circuit majority chose to limit the statute's purpose to general remarks of the State's counsel at oral argument regarding "public morality generally, and the family structure in particular." 904 F.2d at 1088 & n. 7 (Pet. App. 14-15). As noted in a concurrence, however, counsel also made more specific suggestions of possible reasons for banning nudity (discouragement of adultery and divorce). 904 F.2d at 1100 (Posner, J. concurring) (Pet. App. 39). And as Judge Coffey pointed out in dissent, any omission of counsel in setting out a comprehensive list of possible legislative reasons at oral argument should not have prevented the majority from acknowledging legislative concerns that "should be self-evident to an educated man or woman." 904 F.2d at 1113-1114 (Pet. App. 66-67).

Having established that Ind. Code §35-45-4-1 is a content-neutral regulation of nudity in public rather than a content-based restriction on dancing, the next question is the standard to apply in assessing the validity of the statute's impact on nude dancing in public. Under any of the

approaches discussed below, the statute's application is valid.

B. A Generally Applicable, Content-Neutral Criminal Prohibition of Conduct is Valid Regardless of Its Impact on Expressive "Speech".

In his dissenting opinion in *CCNV v. Watt*, *supra*, then-Judge Scalia distinguished between spoken or written communication (which he called "speech") and other forms of "expression." Acknowledging that laws directed at "speech" must be justified by the government, he opined that

> a law proscribing conduct for a reason having nothing to do with its communicative character need only meet the ordinary minimal requirements of the equal protection clause. In other words, the only "First Amendment analysis" applicable to laws that do not directly or indirectly impede speech is the threshold inquiry of whether the purpose of law is to suppress communication. If not, that is the end of the matter so far as First Amendment guarantees are concerned; if so, the court *then* proceeds to determine whether there is a substantial justification for the proscription, just as it does in free-speech cases.
>
> Thus, the First Amendment's protection of free *speech* invalidates laws that happen to inhibit speech even though they are directed at some other activity (sound amplification, campaign contributions, littering). The more limited guarantee of freedom of expression, by contrast, does not apply to accidental intrusion upon expressiveness but only to purposeful restraint of expression. It would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists.

703 F.2d at 622-623 (Scalia, J. dissenting) (emphasis in original, footnotes omitted).

A similar analysis was applied by this Court, speaking through Justice Scalia, in an exercise of religion case, *Employment Division v. Smith*, 494 U.S. ____, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990). In holding that unemployment benefits could be denied to Native Americans who were fired for using illegal drugs, even though they claimed their drug use was for religious reasons, the Court rejected the contention

> that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.

494 U.S. at ____, 110 S.Ct. at 1599. The Court also refused to engage in any balancing of the interests involved "to require exemptions from a generally applicable criminal law."

> We conclude today that the sounder approach, and the approach in accord with the vast majority of our precedents, is to hold the [compelling governmental interest] test inapplicable to such challenges. The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development."

494 U.S. at ____, 110 S.Ct. at 1603, quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988).

The same analysis applies here, as argued by the four dissenters below. 904 F.2d at 1120-1123 (Easterbrook, J. dissenting) (Pet. App. 79-84). Indiana's public indecency law, like the drug law at issue in *Smith*, is an across-the-board criminal prohibition on a particular form of conduct. Regardless of any motive of a dancer (or flasher, or streaker, or sunbather) to communicate a protected First

Amendment message, that motive does not excuse conduct which would otherwise be generally prohibited. This is particularly so where the "speech" is not the sort of political speech at the core of the First Amendment, and where the prohibited activity is *malum in se*.

In this respect the public indecency statute is no different from laws which prohibit murders, even assassinations which express political messages; no one would seriously suggest that a court should balance the interests involved to uphold a murder statute. It is also irrelevant that the criminal proscription involves "public morals," since all criminal statutes involve morality to some extent. See *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (the law "is constantly based on notions of morality"). Certainly Indiana's public nudity prohibition is no less a matter of "morals" than was the law against polygamy in *Reynolds v. United States*, 98 U.S. 145 (1879), or a homicide statute which prohibits ritual human sacrifice.[12]

"Balancing" of interests and determinations of "reasonableness" should also be avoided, at least in the area of content-neutral criminal laws, on the ground of judicial restraint. As argued well in the dissents below,[13] judicial determinations of "reasonableness" permit judges to substitute their views for those of legislatures. This violates

[12]Almost every State has a statute banning public indecency, and in at least 22 States the offense does not require that the victim be offended or unconsenting. (Pet. for Cert. at 13 n. 6.) In their briefs opposing certiorari the respondents attempted to distinguish statutes which require that the indecent exposure be intended to gratify or arouse sexual desire, but it seems that they would be hard-pressed to deny that the nude dancing at issue in this case (with its "emotional theme of eroticism and sensuality") would not satisfy this element. The statutes' use of terms such as "lewd" or "obscene" is largely irrelevant, since those terms are capable of broad or narrow construction by a State's highest court, sometimes in light of constitutional principles.

[13]904 F.2d at 1105-1107 (Coffey, J. dissenting); 1129-1131 (Easterbrook, J. dissenting); 1132-1135 (Manion, J. dissenting) (Pet. App. 48-52, 96-100, 103-109).

the separation of powers when the judge and legislature are established by the same constitution; worse, it sours comity in a federal system when federal judges find that a state legislature's judgment is insufficiently "important" or "reasonable."

For example, the majority below found that Indiana "unquestionably" can ban nude dancing "in settings such as streets, parks and beaches," 904 F.2d at 1088 (Pet. App. 15), but did not explain why that restriction is more "reasonable" than Indiana's ban on nudity in public places such as businesses. A judge might find it more reasonable to *permit* naked strolling in a park, on the ground that such conduct is arguably *less* harmful than concentrating nudity in bars and adult "bookstores"; but that is a judgment for the legislature, not judges. Judge Posner's concurring opinion in this case acknowledged that reasonable people might differ over which is more "ridiculous," First Amendment protection for exposed nipples, or ill-advised attempts to restrict erotic dance. 904 F.2d at 1100 (Pet. App. 38) (Posner, J. concurring).[14]

C. To The Extent that the Statute Incidentally Limits the Expression of Erotic Barroom Dancers, it is Valid As it Furthers Important State Interests Unrelated to Suppression of Expression.

The Seventh Circuit majority suggested that Indiana may regulate nude dancing for reasons unrelated to the suppression of speech under *O'Brien*, *supra*. Under such an analysis, the law penalizing destruction of O'Brien's draft card would be compared with Indiana's penalty on total nudity in a dancer's erotic dance. Assuming that this is a valid analogy, and assuming that the dancing in this case is "speech",

[14]In so doing, Judge Posner also demonstrated the willingness of some judges to mock well-intentioned legislation. *Id.* (expressing lack of admiration for "busybodies," and opining that "[t]he history of censorship is a history of folly and cruelty").

it is clear nonetheless that the public indecency law's incidental impact on that "speech" is valid under *O'Brien*.

The Court in *O'Brien* used a four-part test to determine whether the government's interest in regulating a "non-speech" element (destruction of the draft card there, public nudity in this case) justifies "incidental limitations on expression" (political protest there, erotic message here):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377; *Albertini*, *supra*, 472 U.S. at 687-688. It is beyond dispute that requiring people to wear clothes in public is within the power of the State, thus leaving only the last three elements at issue.

The common law roots of the crime of public indecency serve to underscore the State's "important or substantial . . . interest" in prohibiting public exposure of genitals, buttocks, and female nipples. With the exception of the small minority who are nudists, few would deny that some level of public modesty is necessary in a society whose family and social structure is based on sexual modesty, not public promiscuity. While reasonable people in our society might differ over the "proper" length of a skirt or coverage afforded by a swimsuit (whether worn by a male or female), the interest of government in drawing a *de minimis* line cannot be doubted.

The interest does not change if the nudity is exhibited before consenting adults in a public bar or "bookstore"; indeed, the State's interests there become more urgent. The public display of nudity naturally encourages activities

which break down the family structure. And as Judge Coffey demonstrated in dissent, public nude dancing is damaging to society and citizens by degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal activity. 904 F.2d at 1109-1113 (Pet. App. 56-66). His well catalogued support for these legitimate State interests need not be reproduced here.

These interests are "unrelated to the suppression of free expression," unless the right to express an "emotional theme of eroticism and sensuality" includes the right to advocate adultery, licentiousness, prostitution, and other crime. As shown in Part A above, Indiana's restriction on public nudity does not apply only to erotic dancing, but restricts all nudity without bias against the expression of views.

Finally, the statute's incidental restriction on expression is "no greater than is essential to the furtherance of [the State's] interest." It bears repeating here that the Court has recognized that regulations on live conduct are more easily justified than regulations on depictions of conduct. See *California v. LaRue*, 409 U.S. 109, 117 (1972) (First Amendment protection decreases "as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes"); *Miller v. California*, 413 U.S. 15, 26 n. 8 (1973) (States have "greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975) (scenes of nudity in books and movies distinguishable from "the kind of public nudity traditionally subject to indecent-exposure laws").

It is difficult to imagine a more "incidental" or limited restriction on public nudity than the requirement of "pasties" and a "g-string." None of the plaintiffs testified that their "message" or even alleged artistic effect was impaired

by this *de minimis* regulation. The most honest assessment was probably Darlene Miller's testimony that total nudity sold more drinks. 695 F.Supp. at 420 (Pet. App. 133).

Any suggestion that the scope of the statute could be narrowed even further by creating an exception for establishments which admit only consenting adults must fail for two reasons. First, such an exception reduces the statute's effectiveness in combatting the social ills set out above. As in *Taxpayers for Vincent, supra*, "the substantive evil . . . is not merely a possible by-product of the activity, but is created by the medium of expression itself." 466 U.S. at 810. Second, the First Amendment

> does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests.

Albertini, supra, 472 U.S. at 688. This Court has never required that the governmental interests at stake be implemented by the "least restrictive means." *Id.* at 689; *Ward v. Rock Against Racism*, 491 U.S. ____, ____, 109 S.Ct. 2746, 2757, 105 L.Ed.2d 661 (1989).

D. The Public Nudity Statute is a Reasonable "Manner" Restriction on Barroom Erotic Dancing.

Even in cases where a governmental regulation directly infringes upon expression, the First Amendment permits

> reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions "are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information."

Ward v. Rock Against Racism, supra, 491 U.S. at ____, 109 S.Ct. at 2753, quoting *Clark v. CCNV, supra*, 468 U.S. at 293. In *Clark*, the Court noted that the four-factor *O'Brien* standard is "little, if any, different" from the time, place and manner inquiry. 468 U.S. at 298 & n. 8. Application of the test to Indiana's public nudity law shows that this is true.

The prohibition on nudity is clearly a limitation on the *manner* in which dance is performed, much like the camping ban limited the manner of the sleep-in demonstration in *Clark v. CCNV*, 468 U.S. at 294, and the volume restrictions limited the manner of the rock music performance in *Ward*, 491 U.S. at ____, 109 S.Ct. at 2753. As noted above, it has not been suggested by the plaintiffs that nudity is essential to the erotic nature of their dancing. But even if it is, that element is subject to regulation. Judge Posner admitted as much in concurrence:

> And while in one sense the Indiana statute imposes an outright ban on an expressive activity rather than merely regulating it, in another sense the statute is a mere, and indeed modest (pun intended), regulation. The statute does not ban striptease dancing; it bans only striptease dancing that ends in nudity, which is so narrowly defined that a woman wearing only tiny "pasties" and a G-string is considered clothed. So perhaps it is merely the *manner* of the striptease that is being regulated, and regulations of time, place and manner of expressive activity are treated more leniently than outright bans.

904 F.2d at 1101 (Pet. App. 41) (emphasis in original).

The nudity regulation is "justified without reference to the content of the regulated speech," even if "it has an incidental effect on some speakers or messages and not others." *Ward*, 491 U.S. at ____, 109 S.Ct. at 2754. For example, even though an adult theater zoning restriction treats certain theaters differently based on the content of the films they exhibit, the city's concern with the "secondary effects" of such theatres provides a content-neutral jus-

tification permissible under the First Amendment. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-50 (1986). Similarly, even though the nudity ban may affect erotic dancing differently than square dancing or ballet dancing, it is *justified* on the basis of the secondary concerns discussed in the preceding section: adultery, prostitution, degradation of women, sexual assault, and other crime.

The same legislative policies support a finding that the nudity ban is narrowly tailored to serve significant or substantial governmental interests. As argued in the preceding section, public decency, whether in bars or bookstores, or on sidewalks or beaches, furthers valid concerns relating to family structure, attitudes toward women, and crime. The ban is tailored narrowly enough to serve these interests, and is not an unreasonable "manner" restriction "simply because there is some imaginable alternative that might be less burdensome on speech." *Ward, supra*, 491 U.S. at ____, 109 S.Ct. at 2757, quoting *Albertini, supra*, 472 U.S. at 689. The least restrictive means is not required, so long as the regulation does not burden "substantially more speech than is necessary to further the government's legitimate interests." *Ward, supra*, 491 U.S. at ____, 109 S.Ct. at 2758. A ban on public nudity even before consenting adults does not burden "substantially more speech" than necessary, and to the contrary is itself necessary to target some of the negative effects of public nudity.

Finally, the minimal requirements of Indiana's public indecency statute do not unreasonably limit alternative avenues for communication, because any alleged "erotic message" of the barroom dancer can be communicated just as effectively in scanty apparel as in total nudity. The plaintiffs in this case have never asserted otherwise. In any event, the "alternative avenues" need not be as fully expressive as the restricted speech would be; the Court has asked only whether the restriction renders "the remaining modes of

communication . . . inadequate." *Taxpayers for Vincent, supra*, 466 U.S. at 812. Nothing in the record suggests that the dancers' alleged "theme" cannot be adequately communicated without total nudity.

Conclusion

The judgment of the Seventh Circuit should be reversed, and the judgment of the district court in favor of the petitioners (defendants below) should be affirmed.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

219 State House
Indianapolis, IN 46204
(317) 232-6333

Counsel for Petitioners

November 15, 1990

(15)

No. 90-26

Supreme Court, U.S.
FILED
DEC 17 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

v.

GLEN THEATRE, INC. *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF RESPONDENTS DARLENE MILLER and JR'S KITTY KAT LOUNGE, INC.

PATRICK LOUIS BAUDE
929 South Jordan
Bloomington, Indiana 47401
(812) 855-5927
(*Counsel of Record*)

CHARLES A. ASHER
205 First Bank Building
205 West Jefferson Boulevard
South Bend, Indiana 46601
(219) 233-9341

Counsel for Respondents Darlene Miller and JR's Kitty Kat Lounge, Inc.

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

Statement of the Case 1

Summary of Argument 1

Argument 3

I. Live dancing before an audience is a theatrical performance protected by the first amendment 3

II. The nudity of these dancers is not simply a "manner" of speech: their nudity is a dramatization that sensuality is not shameful 10

A. The underlying interests claimed for the Indiana statute are not furthered by requiring pasties and a g-string..... 10

B. In fact, the actual purpose of the Indiana statute, as applied in this case, is related to the suppression of expression. Its purpose is to restrain the image that sex is not shameful 13

III. The distinction this Court has drawn between obscenity and nudity is a prudent principle 18

Conclusion 23

TABLE OF AUTHORITIES

Page

CASES

Ardery v. State, 56 Ind. 328 (1877) 14

Bleistein v. Donaldson Lithographing Co., 188 U.S. 239 (1903) 8

Brown v. Louisiana, 383 U.S. 131, 141 (1966) 3

Burstyn v. Wilson, 343 U.S. 495 (1952) 6

California v. LaRue, 409 U.S. 109 (1972) 21

City of Dallas v. Stanglin 490 U.S. 19 (1989) 3

Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 4

Doran v. Salem Inn, 422 U.S. 922, 932 (1974) 4

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1141 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986) 9

FCC v. Pacifica Foundation, 438 U.S. 726 (1978) 22

FW/PBS, Inc. v. City of Dallas, 110 S.Ct. 596 (1990) 21

Jenkins v. Georgia, 418 U.S. 153 (1974) 18

Jennings v. State, 16 Ind. 335 (1861) 13

King v. Gallard, 5 Engl. Repr. 547 (W. Kel. 162, 1733) 11

Lasko v. State, 409 N.E.2d 1124 (Ind. Ct. App. 1980) 12, 14

New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981) 21

Osborne v. Ohio, 110 S. Ct. 1691 (1990) 22

TABLE OF AUTHORITIES – Continued

Page

Sable Communication v. Federal Communications Commission, 109 S. Ct. 2829 (1989) 22

Schacht v. United States, 398 U.S. 64 (1970) 3

Schad v. Borough of Mount Ephraim, 452 U.S. 61, 65 (1981) 3, 7

State v. Walters, 440 So. 2d 115 (La. Sup. Ct. 1983) 22

United States v. O'Brien, 391 U.S. 367 (1968) 4

Ward v. Rock Against Racism, 109 S. Ct. 2746, 2753 (1989) 3, 7

Young v. American Mini-Theatres, 427 U.S. 50 (1976) 21

BOOKS AND ARTICLES

Bork, *Neutral Principles and Some First Amendment Problems, 47 Ind. L.J. 1 (1971)* 7

Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments, 66 Ind. L.J.* 175, 186-188 (1990) 16

Donald Downs, *The New Politics of Pornography* 165-188 (1989) 13

Isadora Duncan, *My Life* (1927) cited in 16 ENCY. BRIT. 1002 ..... 17, 19

Northrop Frye, *Words with Power* 188-228 (1990) 15

TABLE OF AUTHORITIES – Continued

Page

John Stuart Mill, "Thoughts on Poetry and Its Varieties," in *The Six Great Humanistic Essays of John Stuart Mill* 3, 8 (1833) 16

John Milton, *Paradise Lost*, IV, 312-316..... 15

Jean-Georges Noverre, *Lettres sur la danse, et sur les ballets* (1760, trans. C.W. Beaumont 1930) cited in 16 ENCY. BRIT 991 5

George Santayana, *The Sense of Beauty* 24 (P. Rice ed., 1955) 8

Mary Wigman, *The Language of Dance* (trans. Walter Sorell, 1966) Cited in 16 ENCY. BRIT 1001..... 5

The Art of Dance, 16 New Encyclopedia Brittanica 986 (1989).....3, 4, 5, 19

STATUTORY MATERIALS

Indiana Penal Code, Proposed Final Draft 127 (1974) 14

Ind. Code Sec. 35-45-4-1 11

STATEMENT OF THE CASE

The statement of the case in Petitioners' brief is in general fair and accurate. The purpose of this brief statement is simply to clarify that there are two different sets of respondents, as there were originally two different cases prior to consolidation in the district court after the first remand. The position of the respondents is not identical, either with respect to the record or to the arguments they have consistently raised. The critical difference consists of the videotaped dances which are attached to the Joint Appendix. These respondents made those tapes for the record. They illustrate the kind of dancing these respondents propose to offer their audiences. The other respondents rely upon a verbal characterization of the dancing they propose. We believe that these dances, as part of the record, speak for themselves. Our argument, therefore, is not that nude dancing is per se protected by the first amendment. In fact, in the concluding section of this brief, we indicate ways in which and circumstances under which the State might regulate nude dancing. What we have consistently sought is a determination that the Indiana statute is unconstitutional as applied to dances like those in the record. Section IIB of this brief argues what we think it means to be dances like the ones in the record.

SUMMARY OF ARGUMENT

Dancing before an audience, unlike social dancing for private pleasure, is a form of communication. It is not simply "conduct" like flag-burning which has acquired

extrinsic meaning. It is therefore protected by the first amendment in the way that music and other nonverbal arts are. In some contexts, including the dances in this record, simple nudity is essential to convey the meaning that the human body is not shameful. This is only in part a message of eroticism: it is also a message about human life and movement. Although the record does not contain an explicit analysis of the dancers' message, we believe this message can fairly be understood from the nature of dance, from the history of nudity in our culture, and from the videotapes themselves. These videotapes reveal dancing which is not explicitly sexual.

The purpose of the Indiana statute, as it has been interpreted by the state courts, is to attach the message of shame to nudity. This policy is not a regulation of time, place, or manner. It is an effort to impose a policy of modesty so as to prevent the dancers' message of movement and naturalness from being expressed. The State's interests in regulating non-communicative aspects of nude dancing can be furthered by various regulations which do not require a total prohibition on nude dancing outside the ballet. The State concedes that "ballet" is constitutionally protected but defining that term would prove more difficult than defining obscenity has been. In any event, the State retains the power to punish obscenity and to regulate nudity in bars (if the legislature chooses to exercise it).

ARGUMENT

I. LIVE DANCING BEFORE AN AUDIENCE IS A THEATRICAL PERFORMANCE PROTECTED BY THE FIRST AMENDMENT.

This Court has long recognized that the rights secured by the first amendment "are not confined to verbal expression." *Brown v. Louisiana*, 383 U.S. 131, 141 (1966). This principle was applied to the wearing of military uniforms during an amateur skit in *Schacht v. United States*, 398 U.S. 64 (1970). Two terms ago, this Court applied the principle to music, which "as a form of expression and communication, is protected under the First Amendment." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989). This Court has not yet directly held that dancing before an audience is a form of expression protected by the first amendment. The majority opinion in the Court of Appeals canvasses a number of sources, ranging from the Book of Psalms, which recognizes the use of dance to communicate praise (*Psalms* 149:3), to the New Encyclopedia Britannica, which details the history and theory of dance as an expressive art.[1] Several cases have referred to nude dancing particularly, observing that "this form of entertainment might be entitled to First

---

[1] As the Encyclopedia Britannica points out, "ballroom dancing" is a different sort of activity, performed by "couples dancing prescribed steps for their own pleasure. . . . " 16 ENCY. BRIT. 990. This Court has accordingly recognized that dancing for private pleasure or association is not protected by the first amendment. *City of Dallas v. Stanglin*, 490 U.S. 19 (1989).

and Fourteenth Amendment protection in some circumstances," *Doran v. Salem Inn*, 422 U.S. 922, 932 (1974), and that "nude dancing is not without its First Amendment protections. . . . " *Schad v. Mount Ephraim*, 452 U.S. 61, 66 (1981).

Dancing is not just conduct which might from time-to-time have communicative or expressive qualities. Acts like setting fire to objects or camping out of doors are normal and commonplace acts whose purpose is usually to alter the physical environment toward some material end. When the item burned is a draft registration card or a flag, or when the camping is designated a protest and infused with meaning because of some extrinsic information or a communicative context, the conduct may have symbolic meaning. E.g., *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984); *United States v. O'Brien*, 391 U.S. 367 (1968). The dance, however, is not a normal, utilitarian act whose purpose is only occasionally expression or communication. The dance is an established form of meaningful movement whose purpose is by nature communicative. "Dance may even have been the first means of communication."[2] In biblical times, the purpose

---

[2] The Art of Dance, 16 NEW ENCYCLOPEDIA BRITANNICA 986 (1989). A subject so rich in literature and culture as the dance has created a vast library of secondary materials. For purposes of this brief, these respondents will limit their aesthetic and historical citations to the discussions in the Encyclopedia Britannica. We wish to assure the court that we have not simply wandered through a large bibliography, seizing marginal views isolated from the artistic or historical mainstream, and stuffing them into our brief to provide the illusion of intellectual authenticity. To provide that assurance, it seems appropriate to limit our cultural references to the unexciting but unmistakably mainstream summaries of the current Britannica.

of dance was "communication between religious leaders and the people." *The Art of Dance*, 16 New Encyclopedia 986 (1989). The classical Greek theatre relied on dance to express beauty as well as grotesque or comical elements. *Id.* at 987. The movements of dance have long been understood as a form of emotive expression. "Different combinations of steps can express different emotions." *Id.* at 988. "There are many things that can be said in dance, others that cannot be said." *Id.* at 989.

> The dancer communicates with the audience in two distinct ways, either through an outpouring of emotion through the body as well as the face or by a complex language of mime and gesture that can be fully understood only by spectators who know the "language." *Id.* at 989.

At a time roughly contemporary with the adoption of the first amendment, the leading work on dance described its expressive and communicative nature in the following phrase: "Dancing is possessed of all the advantages of a beautiful language." Jean-Georges Noverre, *Lettres sur la danse, et sur les ballets* (1760, trans. C.W Beaumont 1930), cited in 16 ENCY. BRIT. 991. In Twentieth Century America, there was a renewed emphasis on the idea of dance as a medium for the communication of subjective human experience. Illustrative of this modern aesthetic would be the work of Mary Wigman who left Germany because of the political suppressions of the Nazis and came to work in the United States, 16 ENCY. BRIT. 1004. As she wrote: "Beyond the personal interpretation underlying the dancer's gesture, there is always the responsibility and obligation to make clear the universal, super-personal meaning. . . . " Mary Wigman, *The Language of Dance* (trans. Walter Sorell, 1966), cited in 16 ENCY. BRIT. 1001.

The State of Indiana apparently recognizes that "*some* dance is communicative." It argues, however, that the dancing of this respondent, Darlene Miller, is not communicative for three reasons. First, the State argues, Ms. Miller candidly acknowledged that her motivation is to earn a living, to "make more money." Brief for Petitioners, p. 16. The State apparently believes that an intent to communicate and an intent to earn money are mutually exclusive. Dr. Johnson observed that any man who writes but not for money is a "blockhead": Darlene Miller doesn't dance for free either. Shakespeare wrote professionally too, and no doubt the publishers of the New York Times bear their fiduciary responsibility to their shareholders in mind. In *Burstyn v. Wilson*, this Court observed:

> That books, newspapers, and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment. We fail to see why operation for profit should have any different effect in the case of motion pictures. 343 U.S. 495, 502 (1952).

And we fail to see why the operation for profit should have any different effect in the case of dance.

Second, the State of Indiana argues, there is no "particularized message" in Ms. Miller's dancing. The State believes that this proposition is evident upon a "review" of the video tapes in the Joint Appendix. Brief for Petitioners, p. 19. The State also argues that there is no message because Ms. Miller testified that she is "just entertaining, just dancing." The State dismisses the theory relied on by the Court of Appeals, that the message is an affective or emotional one. These arguments, like

Judge Easterbrook's dissenting opinion below, seem to be predicated on the principle that "politics are the heart of the First Amendment," Petitioners' Appendix, p. 79. If first amendment protection were limited to the business of discussing governmental affairs, as some have argued it should be, Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1 (1971), the State's argument here would be compelling. So also, as Judge Easterbrook argues in dissent, if non-political speech like music is protected only because it appeals to "rational human thought," Petitioners' Appendix, p. 89, the State's argument would be compelling. We believe this Court has clearly set the first amendment on a different course from that urged by the State and by Judge Easterbrook. In *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2753 (1989), this Court specifically rejected the argument that the constitutional protection of music was only because of its intellectual appeal: "rulers have known its capacity to appeal to the intellect *and to the emotions* (emphasis supplied)." Similarly, in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981), this Court specifically held that "entertainment" is protected by the first amendment. Furthermore, accepting the theory that the first amendment protects only rational, as opposed to emotional, thought would, as Judge Posner observes in his concurring opinion below, "thrust outside the amendment's boundaries virtually all nonverbal art – except the relatively small portion that is didactic – and much literature as well." Petitioners' Appendix, p. 24. Central to the conception of art, poetry, music, dance is its power to engage our emotional as well as our rational selves. As Santayana

wrote, beauty is a value which springs "from the immediate and inexplicable reaction of vital impulse, and from the irrational part of our nature." George Santayana, *The Sense of Beauty* 24 (P. Rice ed., 1955)

Third, the State argues that the dancing in this case lacks "an artistic message." This conclusion is apparently justified because there is no choreography "carefully planned and executed to tell a story or communicate artistically." Brief for Petitioners, p. 12. The State, apparently rejecting the artistic validity of improvisation, characterizes nonchoreographed dancing as "aimless wandering." It may well be that the dancing in this case is not good art. It may be that the dancers are not highly skilled and that the impression they create is not one of grace and skill. But their lack of skill is not a lack of communication. The State has, in effect, created two kinds of messages protected by the first amendment: any "particularized idea" and emotions which are skillfully portrayed – although the state also objected that Ms. Miller danced for money rather than as an unpaid amateur. There are two problems with this theory. First of all, what Justice Holmes said of painting is also true of the dance: "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits." *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903). Second, the question of skill or artistic accomplishment has no logical connection with the issue of whether art is communication. A badly written poem, a poorly performed play, an awkward drawing, are still efforts to communicate – just

as a poorly reasoned syllogism is an effort to communicate. This Court has of course said that artistic merit is relevant in determining what is obscene. That determination is not necessary, or even rationally related, to deciding whether obscenity is communication.

We believe the State may mean to argue that nude dancing can be regulated for other reasons: we don't know how else to understand its argument that the dancing *in this case* lacks communicative value because Judge Posner, in a dictum in a different case, once called topless dancing "artless." Petitioners' Brief, p. 25.[3] Accordingly, the next section of this brief discusses the meaning of nudity.

---

[3] Here is what Judge Posner said in that case, obviously a play on the meaning of the word "art":

> Art, even of the questionable sort represented by erotic photographs in "provocative magazines – even of the artless sort represented by "topless" dancing – today enjoys extensive protection in the name of the First Amendment.

Douglass v. Hustler Magazine, Inc., 769 F.2d 1128, 1141 (7th Cir. 1985), cert. denied, 475 U.S. 1094 (1986).

II. THE NUDITY OF THESE DANCERS IS NOT SIMPLY A "MANNER" OF SPEECH: THEIR NUDITY IS A DRAMATIZATION THAT SENSUALITY IS NOT SHAMEFUL.

The core of the State's argument is this:

> It is difficult to imagine a more "incidental" or limited restriction on public nudity than the requirement of "pasties" and a "g-string."[4]

The core of our argument is that nudity has a meaning in our society quite different from the meaning of the State's sanctioned costume for erotic dancing. Our argument rests on two independent propositions.

A. The underlying interests claimed for the Indiana statute are not furthered by requiring pasties and a g-string. The State argues that there are three purposes to the requirement of what it calls public decency: "valid concerns relating to family structure, attitudes toward women, and crime." Petitioners' Brief, p. 40. The State admits that the legislature has not itself articulated these interests but asserts that they can be derived either from "legislative concerns that 'should be self-evident to an educated man or woman' " (Petitioners' Brief, p. 31, quoting Judge Coffey's dissent in the court below) or from the history of the crime at common law, Petitioners' Brief, p. 28. The one thing that does seem to be clear about the common-law offense is that it did not require women to

---

[4] We will use the term "g-string" because the State does in its brief. Whether such a device would actually satisfy the Indiana statute is a question of design and construction which is not, we think, relevant to the constitutional issue. *But see,* Erhardt v. State, 468 N.E.2d 224 (Ind. 1984).

wear pasties in public. *King v. Gallard,* 25 Engl. Repr. 547 (W. Kel. 162, 1733), involved an indictment "for running in the common Way naked down to the Waist, the Defendant being a Woman." The Court held that "The Indictment must be quashed, for nothing appears immodest or unlawful." It would indeed be truly astonishing to discover that the common law had "politically correct" feminist sensibilities toward the degradation of women, given the shameful restrictions it imposed on their legal rights in all other matters concerning family life. It is also difficult to see how such a hypothetical purpose could underlie the actual Indiana statute at issue in this case, since the statute prohibits both male and female nudity and the showing of "covered male genitals in a discernibly turgid state." Ind. Code Sec. 35-45-4-1. More fundamentally, whatever the considerable social consequences of exhibiting women in displays implying sexual availability, it is difficult to believe that the dignity of women is advanced by the State's approved dance costume of pasties and a g-string.

The State's other asserted interests, protecting the family and preventing crime, are notable for the lack of any evidence to support the link between mere nudity and family breakdown. These respondents do not argue that the Indiana legislature is required to base *its* judgments on plausible evidence. But these asserted interests have never been articulated, or even hinted at, by the Indiana legislature: in the following subsection of this brief, we argue that the actual reason for the Indiana law is the promotion of a particular position about the relationship between the human body and shame. In any event, since the Indiana legislature has, as the State

admits here, not articulated the crime-prevention and family-saving rationales itself, we do not owe it the same duty of accepting a proposition to be true because it *might* be so. As a matter of substance, the State's argument here asks us to accept as reasonable the proposition that adults may gather at revels where only pasties and g-strings are worn, although videotapes and films of full nudity will also be shown: so long as the pasties remain, husbands and wives will be faithful to each other and concerned for their children. The family will be intact and crime will be under control. But the State asks us to believe that removing one more item of clothing from this erotic gathering will affect family life in a significant way. This seems inherently implausible and there is no reason either to believe it or to believe that the Indiana legislature believes it to be true.

If the prevention of adultery or other anti-family crimes were the purpose of the law, nudity in private places would be a matter of at least equal concern. For example, in *Lasko v. State*, 409 N.E.2d 1124 (Ind. Ct. App. 1980), the defendant was a masseuse who was paid ten dollars to remove her clothes while massaging a man. If the statute were concerned with nudity as a danger to family values, this situation is the one fraught with peril. The Indiana Court of Appeals found that the statute did not apply because the room was not open to "witness." That court, discussing Indiana law, specifically held that the purpose of the statute was not to prohibit sexual misdeeds: "The legislative intent in prohibiting such conduct from occurring in a "public place" appears to be to compel persons who wish to engage in such conduct to do so *privately*." *Id.* at 1128 (emphasis in original).

There is certainly an important debate about the social and psychological effects of pornography on important values. There is some evidence that violent pornography causes crime and a serious dispute about the effects of non-violent depictions of sexual activity. None of this evidence, however, shows any link with nudity alone.[5]

B. In fact, the actual purpose of the Indiana statute, as applied in this case, is related to the suppression of expression. Its purpose is to restrain the image that sex is not shameful. In 1861, the Indiana Supreme Court found that the words "public indecency" did not validly define a criminal offense because "the acts which constitute it must vary with the different phases of society depending upon the fastidious, refined, or primitive views of the community in which they happen to be committed." *Jennings v. State*, 16 Ind. 335, 336 (1861). Sixteen years later, the Indiana Supreme Court held that it had the power to supply a definition of the term and did so by defining it as the exposure in a public place of private parts. The court's rationale for this interpretation remains the only authoritative statement of the purpose of the Indiana law. The court said:

> Immediately after the fall of Adam, there seems to have sprung up in his mind an idea that there was such a thing as decency and such a thing as indecency; that there was a distinction between them; and, since that time, the ideas of decency and indecency have been instinctive in,

---

[5] The most recent general review of the empirical literature on pornography and harm is Donald Downs, *The New Politics of Pornography* 165-188 (1989).

> and, indeed, parts of, humanity. And it historically appears that the first most palpable piece of indecency in a human being was the public exposure of his or her, as now commonly called, privates; and the first exercise of mechanical ingenuity was in the manufacture of fig-leaf aprons by Adam and Eve, by which to conceal from the public gaze of each other their, now, but not then, called, privates. This example of covering their privates has been imitated by all mankind since that time, except, perhaps, by some of the lowest grades of savages.
>
> Modesty has ever existed as one of the most estimable and admirable of human virtues.

Ardery v. State, 56 Ind. 328, 329-30 (1877). The present Indiana statute is a linear descendant of the statute described in the *Ardery* case. In proposing the present language, the Indiana Criminal Law Study Commission said of the "nudity" provision involved in the present case that it, and the first two sections of the statute dealing with intercourse and deviate sexual conduct, "are just the restatement of the present law, only more specific in nature." *Indiana Penal Code, Proposed Final Draft* 127 (1974). Indeed, the current version of the statute is still interpreted with an eye toward the story of the Garden of Eden. In the *Lasko* case discussed above, the Court of Appeals observed that "Nudity and sexual activity have flourished in society since Adam and Eve. . . . " *Lasko v. State*, 409 Ind. 1124, 1128.

In short, no plain and simple statement of the purpose of the Indiana statute exists in any authoritative source. The language referring to the metaphor of the

Garden of Eden is not conventional legal analysis. Nonetheless, this story does have a deep and powerful meaning, a meaning which, as the State and Judge Coffey observed of their speculations, "should be self-evident to an educated man or woman." Petitioners' Brief, p. 31. This allegory closely fits the actual operation and interpretation of the Indiana statute and shows that statute to be based on a particular point of view about shame and acknowledgment of sensuality.[6] Prior to the Fall, Adam and Eve were unclothed because they were not ashamed. As Milton put it:

> Nor those mysterious parts were then concealed;
> Then was not guilty shame; dishonest shame
> Of Nature's works, honor dishonorable,
> Sin-bred, how have ye troubled all mankind
> With shows instead, mere shows of seeming pure. . . .

Paradise Lost, IV, 312-316. The key to the State's argument in this case is the contention that a dancer can portray an " 'erotic message' . . . just as effectively in scanty apparel

---

[6] Northrop Frye's study of the meaning of biblical narratives devotes a chapter to the meaning of the story of the Garden as it appears throughout our culture. Northrop Frye, *Words with Power* 188-228 (1990). As he says of the phrase "naked and unashamed" from Genesis:

> The real issue involved here, however, is not one of simple prudery, but of the difference between a poetic and metaphorical structure, founded among other things on the primary concern of sex, and the transformation of this structure into a form of ideological authority.

Id. at 198.

as in total nudity." Petitioners' Brief, p. 40. What can not be conveyed just as effectively is the message that the dancer is not ashamed of what she is doing. The State's g-strings and pasties are signs of apology, "mere shows" of the view that carnal knowledge is forbidden. The fundamental error of the State's theory is in assuming that sensual messages are about sexual intercourse rather than about the sensual world. A fully clothed person can solicit sexual intercourse with words, with gestures. So can a performer wearing pasties and a g-string. The one thing that a dancer dressed in the State's costume cannot say is "I am not ashamed of my sensual nature." This is a powerful message and a legitimately controversial one. It is the expression of this message that the Indiana statute burdens.

Of course Ms. Miller did not articulate the message in these words when she said she was "Just entertaining, just dancing." Petitioners' Appendix, p. 133. She is a dancer, not a theorist. Many artists, even of the high-brow sort whose works hang in museums, cannot articulate their message in a different medium. Even in a verbal medium like poetry, as John Stuart Mill said, "Poetry is feeling confessing itself in moments of solitude, and embodying itself in symbols which are the nearest possible representations of the feeling in the exact shape in which it exists in the poet's mind."[7] The difficulty of

---

[7] "Thoughts on Poetry and Its Varieties," in *The Six Great Humanistic Essays of John Stuart Mill* 3, 8 (1833). See generally, Cohen, "Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments," 66 *Ind L.J.* 175, 186-188 (1990).

reducing into particularized words the fluid meaning of a dance is even more daunting. As Isadora Duncan wrote: "My art is just an effort to express the truth of my Being in gesture and movement." Isadora Duncan, *My Life* (1927), cited in 16 ENCY. BRIT. 1002.

Ms. Miller may not have expressed herself as felicitously as did Ms. Duncan, but we believe the same sentiment is a fair reading of "Just dancing." The dances do speak for themselves and they are part of the record. The videotapes show dancing which is not aggressively sexual in its nature. The women who dance begin clothed and end nude. They do not display their genitals, make suggestive thrusting motions, touch or fondle their breasts or genitals, beckon sexually, or shimmy. They "just dance." Of course respondents do not wish to burden this Court with the task of reviewing dances throughout the country to determine whether the genitals are exposed to view (or some similar test of prurience). Our point is that these tapes, in this record, show a message which is not one of gross sexuality or debauchery. If that were the message, we believe the State of Indiana would be correct – gross sexuality can be communicated about as well with a little scanty clothing. Indeed, sequined ornaments might well heighten such a message by drawing attention to the forbidden, by alluding to the excitement of the shameful. What these tapes show is a natural and sensual dance, without any specific sexual content other than the inherent quality of a nude body in expressive movement to music. They are not great art, although they may be better than the inexpert taping by Mr. Asher (one of the counsel for respondents in this Court) reveals. They may not "tell a story," although

careful observation will reveal that the dancers are at times singing along with the recorded music and, in a technical or formal sense, conveying a particularized message. What they do express, or communicate, is an image that nudity, and by implication the sensual nature of the body in general and these bodies in particular, are not shameful. Clothing the dancer is not just a regulation of the time, place or manner of that message. It is a denial of it.

III. THE DISTINCTION THIS COURT HAS DRAWN BETWEEN OBSCENITY AND NUDITY IS A PRUDENT PRINCIPLE.

In every case presenting the issue, this Court has said that obscenity is not protected by the first amendment. Although the details of that definition have varied over the years, the core has been that obscenity depicts *sexual activity* of some kind in a way that lacks redeeming merit. At the same time, this Court has consistently recognized that mere nudity is not beyond the first amendment. *E.g.*, *Erznoznik v. Jacksonville*, 422 U.S. 205 (1975); *Jenkins v. Georgia*, 418 U.S. 153 (1974). In effect, the State of Indiana in this case is asking the Court to abandon that distinction. The State asks this Court to hold that nude theatrical appearances or nude dancing are unprotected unless they have artistic merit. The legal effect of this new doctrine would be to classify identically a person like this respondent, dancing nude without displaying any sexual behavior, and a couple copulating on stage. Both would be criminal unless they could satisfy the courts that they were "artists" rather than "entertainers." Abandoning the

distinction between nudity and obscenity would do violence to the lines drawn both in our culture and in the past decisions of this Court. It would create great burdens for all courts called upon to administer whatever new lines would emerge. It is also unnecessary since this Court has already recognized a wide range of state powers available for the control of whatever social hazards may arise from non-obscene dancing.

A. Distinguishing "Artistic" Nudity from "Entertaining" Nudity Would Prove To Be Very Difficult. The State concedes that something called "ballet" will be protected by the first amendment. Petitioners' Brief, p. 24. The State does not define "ballet," beyond the suggestion that it is choreographed. The State does not mention other forms of artistic dance, such as modern dance. Choreographing alone cannot be the distinction between "art" and "entertainment" unless the State seriously means to exclude improvisation, an important concept in the work of, for example, Merce Cunningham. 16 ENCY. BRIT. 1003. Likewise, traditional folk-dancing and other ethnic dances are not "choreographed." Perhaps the State believes that something called "ballet" never really involves nudity but avant-garde movements in the United States, Britain, Belgium and The Netherlands do use nudity in something which is usually called "ballet," 16 ENCY. BRIT. 1000.

The State suggests that the determination of artistic merit has become familiar in obscenity cases and that the same techniques could be employed in nudity cases. We submit that the process would be overwhelmingly different. Obscenity – the graphic portrayal of sexual activity in an explicit fashion – is only rarely consistent with

artistic themes. Nudity, on the other hand, has been associated with art in all visual media throughout our history. This is not an accidental link since art has often been concerned with the human body and nudity is a condition of that body.

To illustrate this point in a practical context, suppose the music on the jukebox had been Swan Lake or, perhaps more realistically, "I Feel Pretty" from West Side Story. Suppose the dancer's steps had been written out in advance. Suppose that instead of dancing about half the time clothed (as in these tapes) the dancers remain clothed for three quarters of the proceedings. Now would this be art? We do not believe that this problem would be insuperable for a Court that thought there was a great need to draw this line but we do not think anyone should underestimate the real-world difficulty of drawing these distinctions. The virtues of drawing these distinctions also seem elusive. The State concedes that nudity in "ballet," however exactly it is defined, will be allowed in Indiana. The result may well be no more than allowing men to admire nude women so long as they are not in a working-class context.

B. This State of Indiana Already Has the Power to Deal With the Possible Harms Associated With Nude Dancing. This Court has recognized that the states may deal with problems of indecent behavior in a variety of ways. Whatever validity there may be to the speculations by the Attorney General in his brief that the Indiana statute rests on particular social policies other than the expressive value of nudity in dancing before an audience, the State can reach these problems without a total ban on public nudity. There are at least four different ways in

which Indiana may protect itself from the concrete evils to which it points, all without abandoning the recognized constitutional distinction between obscenity and nudity.

(i) *The Twenty-First Amendment.* If Indiana chose to do so, it could adopt legislation regulating non-obscene but indecent entertainment in bars. *California v. LaRue*, 409 U.S. 109 (1972). Despite repeated references by the State to "barroom" dancing, the Indiana legislature has not bothered to regulate dancing in barrooms. The Indiana legislature has not made findings like those deferred to by this Court in *New York State Liquor Authority v. Bellanca*, 452 U.S. 714 (1981). Whether the particular dancing of these respondents could be regulated under the twenty-first amendment is a question which has not been raised below and is not within the issues presented by the petition for certiorari. But in any event, the state legislature, if it were convinced by the Attorney General's arguments he makes here, would not need a general power over nude dancing to deal with barroom dancing.

(ii) *Regulation.* This court has repeatedly recognized that businesses concerned with sexual matters can be licensed and regulated by the states. These regulations can provide effective means of assuring that prostitution does not flourish, that neighborhoods are protected from possible degradation, and that minors and unconsenting adults are not involved. *E.g., Young v. American Mini-Theatres*, 427 U.S. 50 (1976); *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596 (1990). The one limitation on this principle is the very one the State seeks to circumscribe by its argument in this case. The power to regulate expression which

is sometimes harmful in some contexts is not a justification for banning it entirely. *E.g., Sable Communication v. Federal Communications Commission,* 109 S.Ct. 2829 (1989).

(iii) *Obscenity and lewdness.* An examination of the evidence submitted by these respondents in the videotape which is part of the Joint Appendix shows that these dances do not portray sexual behavior and do not involve display of the genitals. It is possible that some nude dancing might involve such activity and could be found obscene where the authorities trouble to develop the necessary record. *See, e.g., State v. Walters,* 440 So.2d 115 (La. Sup. Ct. 1983). This Court has recently upheld a statutory definition of "nudity" (involving children) as "lewd exhibition or involv[ing] a graphic focus on the genitals." *Osborne v. Ohio,* 110 S. Ct. 1691, 1698 (1990).

(iv) *Affront.* Even constitutionally protected speech can in some instances be restricted to assure that the autonomy of unwilling participants is not invaded. *E.g. FCC v. Pacifica Foundation,* 438 U.S. 726 (1978). The State's creative hypothetical cases, such as the nude park stroller or the rhythmic boom-box flasher, are easily dealt with under the recognized principle of preventing the intrusion of sexual imagery in contexts likely to give affront or in situations where nudity is not communicative.

Of course all these questions are matters for the legislature to address. The one thing we believe the legislature may not do is restrict the communication inherent in the dance by prohibiting nudity altogether or by restricting it to some undefined and prosecutorially administered category called "ballet." Within these limits,

this Court's prior decisions still empower the legislature to deal with the social problems nudity may create.

At the present time in Indiana, however, the situation is completely different. Both the Indiana Supreme Court and the Attorney General acknowledge that nudity is sometimes protected by the United States Constitution. Unfortunately, beyond undefined references to words like "ballet" and "context," no artist, promoter, entertainer or audience may know what is protected. Free expression in a constitutional democracy ought to be more than a question of what the authorities decide to tolerate.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

PATRICK LOUIS BAUDE

CHARLES A. ASHER

(17)

No. 90-26

Supreme Court, U.S.
FILED
DEC 20 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, et al.,

Petitioners,

v.

GLEN THEATRE, INC., et al.; and
DARLENE MILLER, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO, AND CARLA JOHNSON

LEE J. KLEIN*
BRADLEY J. SHAFER
4121 Okemos Road Suite 20
Okemos, MI 48864
(517) 349-8666

Counsel for Respondents Glen Theatre, Inc., Gayle Ann Marie Sutro, and Carla Johnson

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether nude dancing, performed as entertainment indoors and before a willing adult audience, is expression entitled to First Amendment protection?

2. If nude dancing is protected expression under the First Amendment, is Indiana's general public indecency law unconstitutional as applied to such dancing?

TABLE OF CONTENTS

Page

Questions Presented i

Statement of the Case 1

Summary of Argument 3

Argument:

I. PERFORMANCE DANCE IS INHERENTLY "EXPRESSION" OF A TYPE PROTECTED BY THE FIRST AMENDMENT, WHICH PROTECTION IS NOT LOST BY THE INCLUSION OF NUDITY THEREIN 6

A. How the question of whether dance is inherently "expression" arose in this case 6

1. The State of Indiana decisions 6

2. The facts relevant to these Respondents 11

B. Performance dance is inherently "expressive" 13

1. Prior decisions of this Court 13

2. *Speech* versus *Conduct* 19

C. Nudity, as an integral part of "performance dance" does not result in the removal of constitutional protection 23

D. Constitutional protection of performance dance, music, abstract art, etc. cannot be made to depend upon whether such expression evidences a "particularized message" reasonably likely to "be understood." 24

TABLE OF CONTENTS – Continued

Page

1. *Spence* and *Johnson* analysis does not apply. 24

2. Even if applicable, nude performance dance is protected speech under *Spence* and *Johnson* 26

II. THE INDIANA PUBLIC INDECENCY STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE PERFORMANCE DANCE OF THESE RESPONDENTS 27

A. If upheld to preclude the performance dance at issue, the Indiana Public Indecency Statute would effectuate a total ban on constitutionally protected expressive nudity 27

B. Indiana's Public Indecency Statute does not qualify as a content-neutral reasonable time, place or manner regulation 32

1. This statute is not content-neutral 32

2. Even if content-neutral, the Indiana Public Indecency Statute is not a reasonable time, place or manner regulation 37

C. The public indecency statute is not a valid law of general applicability, only incidentally affecting First Amendment rights 42

D. The constitutionality of the Indiana Public Indecency Statute must be evaluated pursuant to strict scrutiny 44

TABLE OF CONTENTS – Continued

Page

E. The Twenty-First Amendment has not been raised, does not apply, and, in any event it is inapplicable to the Glen Theatre Respondents 46

Conclusion 47

TABLE OF AUTHORITIES

Page

CASES

Acosta v. Louisiana Dept. of Health and Human Resources, 478 U.S. 251 (1986) 46

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970) 27

Adims v. State, 461 N.E.2d 740 (Ind. App. 3d Dist. 1984) 9

Arcara v. Cloud Books, 478 U.S. 697 (1986) 42

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 33, 44

Boos v. Barry, 485 U.S. 312 (1988) 5, 32, 36, 45

Brockett v. Spokane Arcades, Inc., 472 U.S. 491 (1985) 29

BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986) 14

Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1961) 43

California v. La Rue, 409 U.S. 109 (1972) ..11, 13, 14, 33, 46

Carey v. Brown, 447 U.S. 455 (1980) 39

Carey v. Population Services International, 431 U.S. 678 (1977) 33

CCNV v. Watt, 703 F.2d 586 (D.C. Cir. 1983), rev'd sub nom. *Clark v. CCNV*, 446 U.S. 931 (1984) 40

Chase v. Davelaar, 645 F.2d 735 (1981) 19

City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983) 6

City of Chicago v. Hanson, 105 Ill. App. 3d 1017, 435 N.E.2d 120 (1982), *cert. denied* 14

TABLE OF AUTHORITIES – Continued

Page

City of Dallas v. Stanglin, 490 U.S. ___, 104 L.Ed.2d 18 (1989) 19

City of Lakewood v. Plain Dealer Publishing Company, 486 U.S. 750 (1988) 40

City of New Port, Kentucky v. Iacobucci, 479 U.S. 92 (1986) 46

Clark v. CCNV, 468 U.S. 288 (1984). 8, 32, 37, 40, 42, 43

Clark v. Indiana, 446 U.S. 931 (1980) 6, 8, 31

Cohen v. California, 403 U.S. 15 (1971) 18, 19

Commonwealth v. Sees, 374 Mass. 532, 373 N.E.2d 1151 (1978) 14, 20

Consolidated Edison Company v. Public Service Commission of New York, 447 U.S. 530 (1980) 43

Cox v. Louisiana, 379 U.S. 536 (1965) 41

Dandridge v. Williams, 397 U.S. 471 (1970) 31

Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 5, 13, 14, 24, 30

Dove v. Indiana, 449 U.S. 806 (1980) 6, 8, 31

Elliott v. State, 435 N.E.2d 302 (Ind. App. 3d Dist. 1982) 6

Employment Division v. Smith, 494 U.S. ___, 108 L.Ed.2d 876 (1990) 43

Erhardt v. State, 463 N.E.2d 1121 (Ind. App. 3d Dist. 1984), *vacated*, 468 N.E.2d 224 (1984) 9, 10

Erhardt v. State, 468 N.E.2d 224 (Ind. 1984) 10

TABLE OF AUTHORITIES – Continued

Page

Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 13, 33, 34, 38

Frisby v. Schultz, 487 U.S. 450 (1988) 4, 30, 38, 44

FW/PBS, d/b/a Paris Adult Bookstore II v. City of Dallas, 493 U.S. ___, 107 L.Ed.2d 603 (1990) 27

Glen Theatre, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988), rev'd, 904 F.2d 1081 (7th Cir. 1990) (En Banc) 10

Glen Theatre, Inc. v. Civil City of South Bend, 728 F. Supp. 728 (N.D. Ind. 1985), rev'd, 802 F.2d 287 (7th Cir. 1986) 31

Glen Theatre, Inc. v. Pearson, 802 F.2d 287 (7th Cir. 1986) 2, 10

Grayned v. Rockford, 408 U.S. 104 (1972) 40

Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 41, 42, 44

International Food and Beverage System v. Ft. Lauderdale, 794 F.2d 1520 (11th Cir. 1986) 14

Interstate v. Dallas, 390 U.S. 676, 682 (1968) 31

Jenkins v. Georgia, 418 U.S. 153 (1974) 13, 24

Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 13, 44

KEV, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) 14

Kingsley International Pictures Corporation v. Regents of the University of the State of New York, 360 U.S. 684 (1959) 34, 36

Koppinger v. City of Fairmont, 311 Minn. 186, 248 N.W.2d 708 (1976) 14

Kovacs v. Cooper, 336 U.S. 77 (1949) 40

TABLE OF AUTHORITIES – Continued

Page

Krueger v. City of Pennsacola, 759 F.2d 851 (11th Cir. 1985) 14

Members of City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 5, 43

McGoldrick v. Compagnie Generale, 309 U.S. 430 (1940) 31

Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982) 14

Miller v. California, 413 U.S. 15 (1973).....3, 19, 22

Miller v. Civil City of South Bend, 887 F.2d 826 (7th Cir. 1989), *vacated*, 904 F.2d 1081 (7th Cir. 1990) (En Banc) 2

Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) (En Banc) ..... *passim*

Moody v. Board of County Commissioners, 237 Kan. 67, 697 P.2d 1310 (1985) 14

Morris v. Municipal Court, 186 Cal. Rptr. 494, 652 P.2d 51 (1982) 14

NAACP v. Button, 371 U.S. 415 (1963)..... 31

New York State Liquor Authorities v. Bellanca, 452 U.S. 714 (1981)..... 14, 46

Peachey v. Boswell, 240 Ind. 604, 167 N.E.2d 48 (1960)..... 8

Perry Education Assn. v. Perry Local Educators Assn., 460 U.S. 37 (1983).....5, 45

Piarowski v. Illinois Community College District 515, 759 F.2d 625 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985)..... 15

TABLE OF AUTHORITIES – Continued

Page

Renton v. Playtime Theatres, Inc., 475 U.S. 431 (1986). 36

Roaden v. Kentucky, 413 U.S. 496 (1973) 44

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 19

Roth v. United States, 354 U.S. 476 (1957)..... 33

Sable Communications v. F.C.C., 492 U.S. ___, 106 L.Ed.2d 93 (1989).....3, 20, 45

Salem Inn, Inc. v. Frank, 501 F.2d 18 (2d Cir. 1974), aff'd in part, 422 U.S. 922 (1975)..... 14

Salem Inn, Inc. v. Frank, 364 F. Supp. 478 (E.D. N.Y. 1973)..... 30

Schacht v. United States, 398 U.S. 58 (1970) 13

Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981) *passim*

Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).....4, 29

Southeastern Promotions, Ltd. v. City of Atlanta, 334 F.Supp. 634 (N.D. Ga. 1971)..... 21

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975).....13, 24, 33

Spence v. Washington, 418 U.S. 405 (1974)....3, 4, 24, 25, 26

State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979) and *Dove v. Indiana*, 449 U.S. 806 (1980)..... *passim*

State v. Brooks, 275 Or. 171, 550 P.2d 440 (1976) ...6, 14

Texas v. Johnson, 491 U.S. ___, 105 L.Ed.2d 342 (1989)..... 24, 25, 26, 33, 40

TABLE OF AUTHORITIES – Continued

Page

Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) 19

United States v. Albertini, 472 U.S. 677 (1985) 37, 43

United States v. Grace, 461 U.S. 171 (1983) 45

United States v. Kokinda, 497 U.S. ___, 111 L.Ed.2d 571 (1990) 43

United States v. O'Brien, 391 U.S. 367 (1968) 25, 42

United States v. Rodriguez, 888 F.2d 519 (7th Cir. 1989) 27

Virginia v. American Booksellers Assn., 484 U.S. 383 (1988) 30

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) 32

Walker v. City of Kansas City, 911 F.2d 80 (8th Cir. 1990), reh'g *En Banc*, denied ___ F.2d ___ (8th Cir. 1990) 46

Ward v. Rock Against Racism, 491 U.S. ___, 105 L.Ed.2d 661 (1989) ..... *passim*

Widmar v. Vincent, 454 U.S. 263 (1981) 45

Wygant v. Jackson Bd. of Ed., 476 U.S. 267 (1986) 45

Winters v. New York, 333 U.S. 507 (1948) 14

Youakim v. Miller, 425 U.S. 231 (1976) 27

Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) 14, 39

Young v. Arkansas, 474 U.S. 1070 (1985) 3, 14

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Annot., 49 A.L.R. 3d 1084 (1973) 14

Bland, A., *A History of Ballet and Dance in the Western World* (1976) 16

Cheshire, *Eroticism in the Performing Arts* in Webb, *The Erotic Arts*, 297 – 306 (rev. ed. 1983) 23

Clarke and Crisp, *The History of Dance* (1981) 16

Duncan, I., *The Art of the Dance* (1969) 23

Graham, M., *A Modern Dancer's Primer for Action* (1941) 25

Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev.1 39

Marks, J., *A Pictorial History of the Dance* (1962) 23

Martin, J., *Introduction to the Dance* (1939) 16

Rogers, F., *Dance: A Basic Educational Technique* (1980) 25

67 C.J.S. *Obscenity* Section 10 (1978) 38

Websters New World Dictionary 1135 (2d ed. 1970) 18

CONSTITUTION AND RELEVANT STATUTES

U.S. Const., Amend. I ..... *passim*

U.S. Const., Amend. XIV 41

U.S. Const., Amend. XXI 11, 14, 46

A.R.S. § 13-140(A) 38

Ind. Code § 35-45-4-1 *et seq.* 6, 35

Ind. Code § 35-49-3-1 *et seq.* 45

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, et al.,

Petitioners,

v.

GLEN THEATRE, INC., et al.; and
DARLENE MILLER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO, AND CARLA JOHNSON

STATEMENT OF THE CASE

Respondents, Glen Theatre, Inc.,[1] Gayle Ann Marie Sutro, and Carla Johnson accept the Statement of the Case submitted by Petitioners subject to the following inaccuracies and/or omissions:

1. Respondent Sutro, in her affidavit submitted to the district court (J.A. 14), confirmed that she has "as an

[1] Respondent Glen Theatre, Inc. has no parent or subsidiary companies to list pursuant to Sup. Ct. R. 29.1.

integral part of [her] dance, removed [her] clothes and danced nude in an art form [she] considered to be artistic." (Clarification added).

2. Petitioners improperly state (Pet. Br. 5), when referencing the findings made by Judge Sharp on remand from the Seventh Circuit (*Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140)), the following: "Based on the videotape and factual findings previously made in all three cases, the district court denied relief and entered judgment in favor of defendants." This is incorrect. Judge Sharp did *not* consider the evidence of *these* Respondents on remand, inasmuch as he had mistakenly dismissed the claims of these Respondents (predicated upon an erroneous finding of mootness) as part of his Memorandum and Order of September 9, 1988 (Pet. App. 120). This mistake was later corrected by a subsequent Memorandum and Order dated October 21, 1988 (Pet. App. 136), which, however, merely vacated the finding of mootness as to these Respondents, and ordered the judgment of September 9, 1988 (applicable to the claims of the Darlene Miller Respondents) to apply to the Glen Theatre Respondents as well (Pet. App. 139). No reference to any findings of fact relative to *these* Respondents was made by Judge Sharp in connection with the (apparent) directions of the Seventh Circuit, on remand.

3. The Petitioners incorrectly accuse the three judge Seventh Circuit panel in *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989) (Pet. App. 112), of having ignored the findings made by Judge Sharp that he had been (apparently) instructed to make. Pet. Br. at 7. Quite to the contrary, the Seventh Circuit, in *Miller*, 887 F.2d at 829, indicated that Judge Sharp had misread their previous instructions on remand; the appellate court having thought it appropriate for Judge Sharp to make the determination in the first instance as to whether or not the State of Indiana was seeking to prohibit nude dancing as entertainment, rather than making a qualitative judgment regarding the artistic merit or aesthetic appeal of any particular dance routine. This was the basis for the *Miller* panel's determination that the district court's determination in this regard was clearly erroneous.

SUMMARY OF ARGUMENT

I. This Court has long held that live entertainment falls within the ambit of the First Amendment. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), and cases cited therein. The specific type of entertainment involved in the instant matter, that being nude dancing occurring indoors before a willing adult audience, has implicitly been recognized by this Court to enjoy some constitutional protection. *Schad, supra*; See also White and Stevens dissenting from denial of certiorari in *Young v. Arkansas*, 474 U.S. 1070 (1985).

Dance performed as entertainment before an audience inherently conveys a message. It is one of sensuality and eroticism, seven of the judges (the majority) below had no problem discerning the particularized message contained in the strip-tease type nude dancing involved here. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (*En Banc*). The fact that the message may be one dealing with sex is further irrelevant, for sexual expression which is not obscene, *Miller v. California*, 413 U.S. 15 (1973), is still protected. *Sable Communications v. FCC.*, 492 U.S. ___, 106 L.Ed.2d 93 (1989).

The state's contentions that the activity involved here is *conduct*, not speech, must also necessarily fail. The "conduct" that the state seeks to regulate, (*nudity*), is inherently interwoven with the expressive activity (dance) and, indeed, is an integral part of the expressive activity such that the state's attempted regulation must be deemed to be directed at the speech itself.

Analysis of whether or not strip-tease type nude dancing is *expression* under the First Amendment pursuant to *Spence v. Washington*, 418 U.S. 405 (1974) is inappropriate. Such analysis is unnecessary when the activity is inherently expressive. *Ward v. Rock Against Racism*, 491 U.S. ___, 105 L.Ed.2d 661 (1989). The *Spence* analysis is used to handle those *arguable* situations where the activity is inherently *conduct* (such as symbolic political speech), yet asserted to be undertaken to convey a particularized message. This is not the case

here. In any event, even if applicable, these Respondents would fulfill the *Spence* requirements in that they expressed their intent to convey a message (of sensuality, allurement and excitement) in their inherently expressive "strip-tease" type performance dance, and that message is reasonably perceived by the audience. The district court below found such intent to exist in its findings of fact.

II. To uphold the constitutionality of the Indiana public indecency statute, as argued by the state, as being either a content-neutral time, place, or manner regulation, or as a facially neutral statute incidentally limiting First Amendment rights, is to effectively overrule a limiting construction given the statute by the Indiana Supreme Court in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979) and *Dove v. Indiana*, 449 U.S. 806 (1980), which excluded from criminal proscription that nudity that is part of a larger form of expression where the communication of ideas is involved. This limiting construction was properly applied by the federal courts below. This Court has repeatedly acknowledged its responsibility to accept state judicial construction of state laws, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and to also give deference to lower federal court constructional interpretation of state statutes. *Frisby v. Schultz*, 487 U.S. 450 (1988).

Under either of the aforesaid arguments proffered by the State of Indiana, each applies only where the underlying activity is deemed expression protected by the First Amendment. However, if Respondents' nude dancing is expression otherwise protected by the First Amendment, then Respondents' performances would properly qualify as the type of expression not proscribable pursuant to the limiting construction given the public indecency statute by the *Baysinger* court. For this Court to apply either of these tests would be to effectively void the limiting construction given the statute by the Indiana Supreme Court.

Additionally, such a ruling would effectively prohibit nude dancing at all times, in all circumstances throughout the entire State of Indiana, a circumstance which this Court has

already determined to be unconstitutionally overbroad. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

Even assuming that either of the foregoing tests are applied by this Court, the statute at issue here, in any event, does not pass constitutional muster. It is not content-neutral. Content-neutral restrictions are those that are justified without reference to the content of the regulated speech. *Boos v. Barry*, 485 U.S. 312 (1988). The Indiana public indecency statute is directed at the content of expression, that being nudity, and, as construed in *Baysinger*, discriminates among nude dancing based upon content. Therefore it is content-specific, and must be evaluated pursuant to "strict scrutiny." Under such scrutiny, the statute fails to be constitutional as it is not necessary to a compelling governmental interest, and because there are less restrictive means available. *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983).

Even if the statute can be assumed to be content-neutral, it is not valid as a reasonable time, place or manner regulation as it is neither narrowly tailored nor leaves open alternate channels of communication. It is not narrowly tailored since the statute effectuates a total ban on all nudity. In addition, the nudity exceptions allowed not only under the state court's limiting construction in *Baysinger*, but also by the state's admittedly arbitrary enforcement of the statute, preclude any conclusion of narrow tailoring. Similarly, there are no "alternate means of communication" available since the statute results in a total ban of public nudity, in all places, at all times, and in all circumstances. Therefore, the statute fails under the intermediate level of scrutiny as well.

Nor is the statute justifiable as only incidentally impacting upon First Amendment speech. Those cases decided by this Court applying such a test have been limited to circumstances where the government was acting as a proprietor to manage its own property or internal operations. See, for example, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). It is fallacious to argue that a total ban throughout the state of nudity has only an "incidental impact" on expression.

ARGUMENT

I.

PERFORMANCE DANCE[2] IS INHERENTLY "EXPRESSION" OF A TYPE PROTECTED BY THE FIRST AMENDMENT, WHICH PROTECTION IS NOT LOST BY THE INCLUSION OF NUDITY THEREIN.

A. HOW THE QUESTION OF WHETHER DANCE IS INHERENTLY "EXPRESSION" AROSE IN THIS CASE.

1. The State of Indiana decisions.

Understanding the development of Indiana case law applicable to the instant statute is germane to the consideration of the issues before this Court. Judge Posner's recitation in this regard is illuminating:

> An Indiana statute makes public indecency, including appearing nude in public, a crime. Ind. Code §35-45-4-1(a)(3). The normal operation of the statute is illustrated by *Elliott v. State*, 435 N.E.2d 302 (Ind. App. 3d Dist. 1982), where the defendant was convicted of urinating in public. However, in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), appeal dismissed for want of a substantial federal question under the name *Clark v. Indiana*, 446 U.S. 931, 100 S. Ct. 2146, 64 L.Ed.2d 783 (1980) [and *Dove v. Indiana*, 449 U.S. 806 (1980)], the Indiana Supreme Court interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public. The interpretation was not inevitable. *State v. Brooks*, 275 Or. 171, 550 P.2d 440 (1976); compare *City of Chattanooga v. McCoy*, 645 S.W.2d 400, 401 (Tenn.

---

[2] These Petitioners use the terminology "performance dance" to refer to any dance presentations performed as entertainment before a consenting adult audience. Since the intended performance by Respondent Gayle Sutro was not to occur in a "bar room", nor was it to include "table dancing" or any such like concepts, referring to the intended performances of these Respondents as nude "bar room" type dancing is inappropriate and misrepresentative of the actual circumstances.

> 1983). But, having been made, it induced the Indiana court in *Baysinger*, in an effort to save the constitutionality of the statute, to carve out an exception for performances having an expressive character. *That is how the issue of "expression" got into this case*. If the striptease dances that the plaintiffs want to put on for their customers are not expressive, then since at the end of the dances the dancers are nude, the statute makes the dances criminal.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1090 (7th Cir. 1990) (*En Banc*) (Posner, J., concurring) (Pet. App. 19) (emphasis and clarification added).

Significant to the *Baysinger* court's determination was the following:

> Appellees make no claim that there is any pure speech involved in their appearances. *They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place*. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude.

Baysinger, supra, 397 N.E.2d at 587. (Emphasis added).

Although the Appellees in *Baysinger*, (like all Respondents here), were engaging in nude dancing, the court determined their claim to be insufficient.

> This is a claim for some kind of a right to appear nude in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, *this claim* does not rise to the level of a First Amendment claim.

Id., at 587. (Emphasis added).

As the court stressed, "A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance *as presented in these cases* is simply conduct or is expression entitled to First Amendment protection." *Id.*, at

587 (emphasis added). There being no contention that speech or expression of any ideas was involved or inhibited, the activity was deemed to be conduct. On appeal to this Court, the matter was dismissed for want of a substantial federal question. *Clark* and *Dove, supra.*

The *Baysinger* court was implicitly recognizing this Court's prior determinations that the burden is initially on the individual to establish a threshold First Amendment claim.

> Although it is common to place the burden upon the government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to.

Clark v. CCNV, 468 U.S. 288, 294 n. 5 (1984).

The *Baysinger* court did, however, in order to save the public indecency statute from a successful facial overbreadth attack, give the statute a limiting construction:

> There is no right to appear nude in public. *Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved.*

Baysinger, supra, 397 N.E.2d at 587 (emphasis added).

Because of the central role that this construction plays in the analysis of the legal issues, *infra*, it will be hereinafter referred to as the "*Baysinger* exception" or "*Baysinger* limiting construction."

The *Baysinger* decision also did something else. In relying on their previous decision in *Peachey v. Boswell*, 240 Ind. 604, 167 N.E.2d 48 (1960), the Indiana Supreme Court indicated that the term "public place" as set forth in the public indecency statute clearly applied to "taverns and bars," and

that the phrase would generally apply to any areas " 'open to common and general use, participation, or enjoyment' of the public." *Baysinger, supra*, at 582-583. This construction was further extended by the Indiana Court of Appeals in *Adims v. State*, 461 N.E.2d 740 (Ind. App. 3d Dist. 1984), which concluded that a private viewing booth, such as exists on the business premises of Respondent Glen Theatre Inc., was a "public place" in consideration to the application of the public indecency statute.

Five years after *Baysinger*, the Indiana Court of Appeals, in *Erhardt v. State*, 463 N.E.2d 1121 (Ind. App. 3d Dist. 1984), reversed a conviction under the public indecency statute of a dancer who, as part of a "Miss Erotica of Fort Wayne" contest danced in two songs, the second of which was completed wearing only a g-string and scotch tape crisscrossed over her nipples. The appellate court, cognizant of the *Baysinger* limiting construction, determined however, that the statute "[d]oes not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity." *Id.*, at 1121.

The *Erhardt* court concluded:

> After considering all of the foregoing, we are constrained to conclude that non-obscene nude dancing performed in an enclosed theatre for the entertainment of the paying spectators, all as occurred here, is presumptively protected as expression under the First Amendment, and the state, by its evidence, established a prima facie case that Ms. Erhardt was acting lawfully.

Id., at 1126.

Erhardt and *Baysinger* can only be reconciled by recognition of the difference in the underlying factual scenario concerning "expression". In *Baysinger*, no claim of pure speech or expression of ideas was asserted to be involved or inhibited. The *Erhardt* court, however, found that the *state's evidence* established a "prima facie case", 463 N.E.2d at 1126, so that the Defendants activity fell within the *Baysinger* exception, thereby implicitly concluding (based on the record in front of it) that expression meriting protection existed.

Erhardt had not asserted, as did the Appellees in *Baysinger* (and the Miller Respondents here) that her performance was devoid of speech.

Had there been no further change in the judicial construction of the statute, this matter would probably not be in front of this Court today.

However, the Indiana Supreme Court, in a brief, one page opinion, reversed the Indiana Court of Appeals decision in *Erhardt*. Without any discussion of the constitutional issues involved, and with no more than a cursory reference that the *statute* had been upheld against constitutional attack in *Baysinger*, Erhardt's conviction was reinstated. *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). By so doing, the Indiana Supreme Court ignored what it had previously considered to be apparently critical underlying evidence in *Baysinger*; that being the lack of any expressed intent to "communicate". Rather, by its ruling, the court implicitly held that nude dancing is only *conduct*, devoid of sufficient "*expression*" so as to bring it within the *Baysinger* exception.[3] That is how the issue of "expression" got into this case.[4]

---

[3] While it may appear that the Indiana Supreme Court's decision *Erhardt* did not necessarily address the constitutional issue, due to its statement that the dissenting opinion of Judge Connor in the *Erhardt* appellate court decision was "correct in every respect", 468 N.E.2d at 225 (which dissenting opinion perceived the evidence to be sufficient, under appellate standards of review to convict and further asserted that the First Amendment challenge had been waived, *Erhardt*, 463 N.E.2d at 1127), the last two paragraphs of the majority opinion directly refer to Erhardt's activity as "conduct" that squarely falls within the statute's proscription.

[4] Indeed, it is this *sole issue* (whether or not nude performance dance is "expression") that was raised in and addressed by the federal courts below. This is well illustrated by the remand of the initial Seventh Circuit decision, *Glen Theatres, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), (Pet. App. 140) to allow the district court to determine whether the performance dance at issue was expressive conduct. "Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment *and outside the reach of the public nudity statute as construed by Baysinger*." *Id.*, at 290 (Pet. App. 146) (emphasis added). See, also, *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 418 (N.D. Ind. 1988)

(Continued on following page)

2. The facts relevant to these Respondents.

It is uncontested that the Chippewa Bookstore (Glen Theatre's business premises) neither sold nor permitted consumption of alcoholic beverages on its business premises (J.A. 15), that no accidental viewing by any non-consenting member of the public of any nude entertainment is possible at its premises (J.A. 16), that Respondent Sutro affirmatively asserted that her dance performances are an attempt to communicate as well as to entertain (J.A. 14), and that as an integral part of such routines, she removes her clothes and dances nude (J.A. 14). In addition, there has never been any contention by the state that the dance performances at issue were, or would be obscene (Pet. App. 154 n. 3). Based on the foregoing, the circumstances of these Respondents and those of JR's Kitty Kat Lounge and Darlene Miller differ in two material specific respects.

First, Glen Theatre does not sell or permit consumption of alcoholic beverages on its premises. If and to the extent that the Petitioners now assert, or this Court concludes, *sua sponte*, that the Twenty-First Amendment provides sufficient authority to uphold the statute, *California v. La Rue*, 409 U.S. 109 (1972), such analysis is inapplicable to the "*as applied*" challenge by these Respondents. See Section II(E), *infra*.

Second, and perhaps more importantly, Respondent Sutro's intended performances were specifically and *affirmatively asserted* to be an attempt to communicate as well as to entertain, with the nudity included therein being an integral part of her performances. Unlike Darlene Miller and JR's

---

(Continued from previous page)

(Pet. App. 128-129), upon remand ["There is nothing left for this court to decide but whether the nudity in question is expressive activity protected by the First Amendment."] If not explicit, it was at least implicit in these decisions that if the questioned performance dance was "expression", that conduct fell within the *Baysinger* exception, and that the public indecency statute could not, therefore, constitutionally be applied in these circumstances. Any other arguments raised by the Petitioners at this point, are, for this reason, irrelevant.

Kitty Kat Lounge,[5] these Respondents do not contend that there is no communicative element to be expressed by Sutro's intended performances, and, in fact, assert quite to the contrary. This distinction may very well be one of constitutional proportions, given the obligations of a claimant to initially demonstrate First Amendment applicability.[6] See also discussion in Section II, *infra*.

---

[5] The district court found that "the avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later," and determined that "Ms. Miller wants to dance nude because she believes she would make more money doing so . . . ". 695 F.Supp. at 420 (Pet. App. 133). Additionally, Miller's counsel, at oral arguments before the En Banc panel below asserted: "[T]here is not a larger political or ideological statement being made. I do not contend for a second that that is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in *Schad* [*v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)], that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said." 904 F.2d at 1116, 1123 (clarification added) (Pet. App. 71, 85).

[6] If the arguments of the dissenters in the Seventh Circuit *En Banc* decision below are accepted, and, in particular, the reasoning of Judge Easterbrook, then this distinction is one of critical importance, for Judge Easterbrook's reasoning is, to a large extent, predicated upon the Miller Respondents' affirmative assertion of the lack of any intended expression. For example, Judge Easterbrook argues that: "[t]he state's burden is especially light because the plaintiffs do not seek to transmit *any* message." *Miller* (*En Banc*), *supra*, 904 F.2d, 1081, 1120 (Easterbrook, J., dissenting). He further points out: "The district court found that the dancers are not trying to express an idea; *the dancers agree*." *Id.*, at 1125 (emphasis added). Judge Easterbrook concludes, at page 1128, that "[c]onduct gets to be 'otherwise protected', however, by having an element of 'expression' ". Demonstrating the importance that the lack of intent to "express" plays in his analysis, Judge Easterbrook goes on to state that "[t]hese principles do not aid the plaintiffs today, however, for they have not established that they are engaged in 'expression' ". *Id.*, at 1128. As to Petitioners Gayle Sutro and Glen Theatre, this is not so. And it is of no moment, however, that these Petitioners did not state (they were not asked, nor did it arise as an issue in the district court) exactly what this "expression" was. A message of sensuality and sexuality is obvious, as is demonstrated by the fact that it was readily perceived by seven judges of the Seventh Circuit. Certainly, Judge Easterbrook's analysis in his dissent does not turn upon "what" the message was, but rather what he perceives to be the lack of an intent to convey any message.

In any event, these Respondents did assert the existence of an intent to communicate and entertain through performance dance, which includes, as an integral part thereof, nudity. Accordingly, even under Judge Easterbrook's analysis in dissent in the Seventh Circuit below (n. 6, *supra*), the performances are entitled to First Amendment protection.[7]

B. PERFORMANCE DANCE IS INHERENTLY "EXPRESSIVE".

1. Prior decisions of this Court.

There is little room for doubt that under current precedent of this Court, performance dance is protected by the First Amendment, particularly when occurring indoors before a consenting adult audience. Loyalty to prior pronouncements, and a logical application of the underlying constitutional principles, makes this conclusion inescapable.

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Schacht v. United States*, 398 U.S. 58 (1970); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). See also *California v. La Rue*, 409 U.S. 109,

---

[7] The distinctions between the positions taken by these Respondents and the Darlene Miller Respondents emphasize the concerns noted by Judge Easterbrook. While the Respondents here, through Gayle Sutro's affidavit, specifically asserted that nudity was an integral part of her expressive dance performances, Darlene Miller merely testified that her nudity was an effort to make more money. This distinction may be of critical constitutional importance when determining whether the *nudity* aspect of a particular dance performance may be regulated (or even precluded) based upon not only an asserted governmental interest, but also upon the importance of the nudity to the mode, or more importantly, the content of the expression.

118 (1972); *Young v. American Mini Theatres, Inc.* [427 U.S. 50, 61, 62 (1976)].

Schad, supra, at 65 (emphasis and clarification added).

Entertainment is so protected because the "line between the informing and the entertaining is too elusive" for demarcating First Amendment protections. *Winters v. New York*, 333 U.S. 507, 510 (1948).

While admittedly never directly so stating (see *Young v. Arkansas*, 474 U.S. 1070 (1985), White and Stevens, dissenting from denial of Certiorari), this Court's holdings in *La Rue, Doran, Schad* and *New York State Liquor Authorities v. Bellanca*, 452 U.S. 714 (1981), were undeniably premised upon the foundational supposition that at least some of the nude dancing that was sought to be proscribed in each of these cases enjoyed constitutional protection. For example, in *La Rue*, this Court need not have ever considered whether the state's rights under the Twenty-First Amendment outweighed the First Amendment concerns in question. If no First Amendment rights existed, the state's inherent police power would have been sufficient to justify the proscription. This interpretation of Supreme Court precedent (that nude dancing does enjoy some constitutional protection) has repeatedly and consistently been recognized by federal and state courts.[8] In fact,

---

[8] A synopsis of the legal status of nude dancing in the various jurisdictions across the United States is found at 49 A.L.R. 3d 1084 (1973). As a partial list supporting the constitutional protections of nude or semi-nude performance dance, see, for example, the federal appellate decisions of *International Food and Beverage System v. Ft. Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986); *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n. 3 (2d Cir. 1974), *aff'd in part*, 422 U.S. 922 (1975). Illustrative of state court holdings are *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska. 1982); *Moody v. Board of County Commissioners*, 237 Kan. 67, 697 P.2d 1310, 1316 (1985); *Morris v. Municipal Court*, 186 Cal. Rptr. 494, 652 P.2d 51 (1982); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978); *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (1976); *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976); and *City of Chicago v. Hanson*, 105 Ill. App. 3d 1017, 435 N.E.2d 120, 123 (1982), *cert. denied*. In addition, the contemporary legal commentary is in accord with *Schad*

(Continued on following page)

the Seventh Circuit, prior to the decision now at issue, concluded that "entertainment that falls short of anyone's idea of 'art,' " *including "topless dancing"*, is protected under the First Amendment unless the "artistic expression is obscene in the legal sense." *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985) (emphasis added).

To now hold that performance dance which includes nudity is not protected expression would be an anomaly, and would undermine not only the basic premise inherent in numerous previous decisions of this Court, but would serve to reverse a large number of properly decided federal and state appellate decisions.

The determination below by the Seventh Circuit that " . . . dance as entertainment is a form of conduct that is inherently expressive", *Miller* (*En Banc*), *supra*, 904 F.2d at 1085 (Pet. App. 9), is indeed the only logical conclusion that can be reached. The evolution of dance, both globally and in western culture, its relationship to religion, and its well chronicled history as a medium of expression, amply demonstrates this rather self-evident point. See 904 F.2d at 1083,

---

(Continued from previous page)

that non-obscene nude performance dance merits constitutional protection. See the compilation prepared by the Seventh Circuit majority below, 904 F.2d at 1087 (Pet. App. 13).

Amici State of Arizona, et al., assert, however, without citations, that the state supreme courts of "Arkansas, Florida, Indiana, Louisiana, Maine, Michigan, Nebraska, Oregon and Tennessee" have concluded that " 'nude dancing' of the variety at issue in this case – 'barroom,' 'go-go', 'strip-tease' – is not protected" by the First Amendment. Br. 8 and n. 1. This is not only a blatant misrepresentation of the holdings of the various cases in those jurisdictions, but also ignores subsequent decisions of those states' appellate courts. For a full recitation as to the current status of the law in those jurisdictions, see the Br. in Opp. to Pet. for Cert. of Resp. Glen Theatre, Inc., et al., at 15-25.

Finally, the state argues that there are 22 state statutes where the offense of public indecency does not require that the victim be offended or unconsenting. Pet. Br. 34 n. 12, citing Pet. for Cert. at 13 n. 6. Most of those statutes are either distinguishable, or have received limiting constructions by state or federal courts so as not to apply to the nude performance dance here at issue. See Br. in Opp. to Pet. for Cert. of Resp. Glen Theatre, Inc., et al., at 9-13, esp. n.'s 5, 6 and 7.

1089-1090 (Pet. App. 5, 17-18). See also, Martin, J., *Introduction to the Dance* (1939); Clarke and Crisp, *The History of Dance* (1981).

As Alexander Bland observed,

> It is the perfect synthesis of abstract and human, of mind and intellect and emotion, discipline and spontaneity, spirituality and sex-appeal to which dancing aspires; *and in dance-as-communication, which is my concern here*, it is the most vivid presentation of this act of fusion which represents the ideal performance.
>
> There are many ways of stalking this ideal, as history shows. With slow or sudden shifts in the nature of society or conditions, different emphases are laid on different ingredients. As dancing (like sport) has changed from a participatory to a spectator experience, new expedients have been devised to intensify the communication between performers and audience, ranging from sheer weight of numbers to gymnastic virtuosities, from novel staging to unusual accompaniment. But the basic appeal remains the same – *the transmission of a state of awe and excitement (whether exhilarating, emotionally moving or simply aesthetic) from performer to spectator.*
>
> The difficulty of defining this experience explains the complexity of the qualities needed to produce it. An audience can be set on fire by spectacle or histrionics, by skill or explosive energy, by graceful lyricism or boisterous comedy. It can be stirred by unusual arrangements of steps or figures, by the physical beauty of the dancers or by dramatic stage devices. It can be stimulated by originality or delighted by the familiar. *The effect may be dominated by the choreographer, the designer, the musician or the dancer. In the long run it is the last who counts most.*

Bland, A., *A History of Ballet and Dance in the Western World*, (1976), at pages 10-11 (emphasis added).

When most recently analyzing the applicability of constitutional protections to rock music, this Court had no difficulty in recognizing its inherent expression:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to *appeal to the intellect and to the emotions*, and have censored musical compositions to serve the needs of the state. [T]he Constitution prohibits any like attempts in our own legal order.

Ward v. Rock Against Racism, supra, 674 (emphasis added, citations omitted).

Parallel observations made by the majority and concurring opinions here below well illustrate the inherent expressive nature of dance. Judge Flaum observed that "dance as entertainment is one of the earliest forms of expression known to man," citing to both its historical and biblical roots. He continued:

> Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to *express an emotion or idea*, to narrate a story, or simply to take delight in the movement itself." [I]nherently, it is the *communication of emotion or ideas*. At the route of all '[t]he very manifestations of dancing . . . lies the common impulse to resort to movement to externalize states *which we cannot externalize by rational means*. This is basic dance."

Miller (*En Banc*), *supra*, at 1085 (Pet. App. 9) (emphasis added) (citations omitted).

Judge Posner, in his concurrence, agreed with this position:

> Dance, as Judge Flaum emphasizes with pertinent references, is a medium of expression, of communication. What it expresses, what it communicates, is, like most art – particularly but not only nonverbal art – *emotion*, or more precisely an ordering of sights and sounds that arouses emotion.

Id., at 1091 (Pet. App. 20-21) (emphasis added). Dance, like the music in *Ward*, has the same "capacity to appeal to the intellect and to the emotions," and is, similarly, inherently expressive.

The dissenters are critical of the majority's finding of "expression" to inherently exist in "nude dancing" of the type involved here. Such a conclusion, these Respondents contend, is no more than a judicial attempt to distinguish "good" art from "bad", as demonstrated by Judge Easterbrook's demarcation between Mozart's music and a humpback whale's song by characterizing the former as "profound", defined as being "marked by intellectual depth."[9] 904 F.2d at 1081, 1125-26 (Pet. App. 90). As noted by Mr. Justice Harlan in *Cohen v California*, 403 U.S. 15 (1971):

> Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id., at 25.

Certainly, the application of the First Amendment to art does not, and cannot turn upon whether or not federal judges are unable to discern or particularize a specific message.[10] Indeed, numerous ballet performances and modern dance recitals contain no discernable plot or specific message, yet to contend that they do not "communicate" defies credulity. As further noted by Justice Harlan:

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be

---

[9] Websters New World Dictionary 1135 (2d ed. 1970)

[10] Judge Flaum, writing for the majority below, had the following to say regarding Judge Easterbrook's analysis in this regard: "Any attempt to distinguish 'high' art from 'low' entertainment based solely on the advancement of intellectual ideas must necessarily fail. Judge Easterbrook contends in dissent that music and ballet are protected because music appeals to the intellect and ballet tells stories, whereas nude dancing offers neither. Dissent at [904 F.2d 1124 (Pet. App. 87)]. Not all ballet tells stories, however, and not all music appeals to the intellect. The art/entertainment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought; this attempted demarcation would leave them essentially unprotected." *Miller* (*En Banc*), *supra*, at 1086 (Pet. App. 10) (clarification added).

> the more important element of the overall message sought to be communicated.

Cohen, *supra*, at 26.

2. *Speech* versus *Conduct*.

The speech versus conduct dichotomy is, indeed, a difficult one, made so necessarily by the fact that all speech is inherently conduct in some form, and in all conduct, "[i]t is possible to find some kernel of expression . . . ". *City of Dallas v. Stanglin*, 490 U.S. ___, 104 L.Ed.2d 18, 25 (1989).[11] As observed by the Ninth Circuit, "[w]e are troubled by the special dangers involved in applying the speech/conduct distinction to theatrical productions or stage performances." *Chase v. Davelaar*, 645 F.2d 735 n. 12 (9th Cir. 1981).[12]

Certainly, even the dissenters below do not contend that dance is never speech protected by the First Amendment. They appear to argue that because the dance here includes nudity, and further that because the apparent message is [to them] exclusively one of sexual dimensions, it does not rise to

---

[11] This is not, however, the circumstance that this Court faced in *Stanglin*. The issue in *Stanglin* was whether "recreational dancing" was protected conduct under a general "right of association" recognized to exist in the First Amendment. *Stanglin*, *supra*, 104 L.Ed.2d at 25-26. This Court, quite properly, concluded that *recreational dancing* qualified neither as a form of " 'intimate association' nor as a form of 'expressive association' as those terms were described in *Roberts* [*v. United States Jaycees*, 468 U.S. 609 (1984)]." *Stanglin*, *supra*, 104 L.Ed.2d, at 26 (clarification added). This case raises no such "associational" rights. At issue here is the consideration of the expressive nature of *entertainment*, conducted by a *performer* before a willing *audience*, which, simply, did not exist in the *Stanglin* circumstances.

[12] The Ninth Circuit elaborated: "We are hesitant to rely uncritically on the speech/conduct dichotomy. In part, our hesitancy arises from the conceptual weakness of the distinction. 'Speech' – communication of ideas or attitudes – is itself a form of 'conduct.' . . . In part, we are hesitant because what would ordinarily be called 'speech' may not be 'speech' for First Amendment purposes – e.g., obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973) – whereas what would ordinarily be classified as 'conduct' may well be treated as protective 'speech' – e.g., wearing a protest armband, *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." *Chase*, *supra*, at 793 n. 12. (Citations and parallel citations omitted).

the level of protected artistic merit. This is a puzzling position, however, given this Court's repeated indications that nudity does not place otherwise protected expression outside of the mantle of the First Amendment, *Schad, supra*, at 66, and that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications v. F.C.C.*, 492 U.S. ___, 106 L.Ed.2d 93, 105 (1989).

The dissenters' position is even more puzzling given that as to Respondent Gayle Sutro, they did not even see her dance performance. Sutro did not submit a videotape demonstration of her dance. The observations made by the Massachusetts Supreme Judicial Court in *Commonwealth v. Sees, supra*, are apropos:

> So far as the record before us discloses, the dancer may have been rendering a selection from the "Ballet Africains" or some other work of unquestionable artistic and socially redeeming significance. Though not shown by proof, it seems more likely that she was engaged in "the customary 'barroom' type of nude dancing," involving "only the barest minimum of protected expression." To distinguish between the two, however, would be to cast on the police and courts "the anomalous duty of serving as . . . artistic constables," evaluating the artistic worth and tasteful quality of the performance in its total context. No governmental interest is shown to warrant the effort.

Id., at 1155 (citations omitted).

Indeed, it would seem inappropriate to require trial courts to review each and every distinct dance performance, in order to determine whether they contained sufficient expressive elements to merit constitutional protections. For example, if this Court finds the dance performances as represented by the Miller Respondents' videotape (J.A. Supp.) to be constitutionally protected expression, by requiring courts to make a case by case analysis of whether constitutional protections attach to any dance performance, it could easily be argued that if the dancers at JR's Kitty Kat Lounge deviate from the performances as contained in the videotape *in the slightest respect*, further court intervention will be necessary

to ascertain whether First Amendment protections no longer attach, merely on the basis of the deviation in performance.

In this regard, this Court should take notice of what occurred here below. When the Seventh Circuit remanded this action back to the district court for consideration of the issue of whether the asserted dance performances "should be afforded First Amendment protection," 802 F.2d at 291, the district court judge took that direction quite literally, and believed that he was required to actually view the intended performance. However, as noted by the Seventh Circuit (vacated in *Miller (En Banc)*, *supra*) following the district court's review of the evidence:

> When a court grapples with a delicate and emotionally charged issue, sometimes, unavoidably, an unintended ambiguity may find its way into an opinion. A careful reading of the opinion, however, ordinarily will clarify any questions. In this case, although we might have been more precise in our instruction on remand and substituted words "activity they wish to engage in" for "dancing they wish to perform," on the whole we believe our guidelines were misread. As we explained in *Glen Theatre*, the case law points to the conclusion that non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection. *Given the posture of the case, however, we thought it appropriate that the district court make the initial determination of whether the State of Indiana was, in fact, seeking to enforce its statute to prohibit nude dancing as entertainment, and thus limit plaintiffs expression. We did not intend for the district court to make a qualitative judgment as to the aesthetic appeal of artistic merit of a particular dance routine.*

887 F.2d, at 826 (Pet. App. 112) (emphasis added).

This observation by the Seventh Circuit is correct, and the only true issue to be addressed should be whether *performance dance* is inherently expressive; not whether any particular dance routine may be. Once it is acknowledged that

performance dance is inherently expressive, the First Amendment limits the government's ability to preclude such expression.

For example, this Court has already set forth a standard by which to judge when sexual expression loses its protective qualities. *Miller v. California, supra.* In any event, looking at this case from a perspective which focuses on the sexual aspect of the expression does an injustice to dance as a form of art. It would certainly surprise many of those self proclaimed elite to find that the multitude of modern dance and ballet companies touring this country, whose performances have no scripted plot nor verbalization, yet include both partial and total nudity, are devoid of any protection of the First Amendment.[13]

Establishing a concrete test to distinguish speech versus conduct when dealing with the arts is unnecessary to a resolution of this case. All that is required is the determination that non-obscene performance dance falls on the protected side of the intangible line. Such a conclusion, these Respondents contend is unavoidable. Any other conclusion would be "[i]ndefensible and a threat to our artistic freedom".[14] *Miller* (*En Banc*), *supra*, at 1090 (Pet. App. 18) (Posner, J., concurring).

---

[13] Examples of dance companies which perform in America abstract content ("plotless") dance with nudity, which under the Indiana public nudity statute is proscribable, include: Bill T. Jones/Arnie Zane Co. – at present on tour of 22 U.S. cities including some in the Midwest, (one piece is "52 Handsome Nudes" which has 52 nudes on stage); Paul Taylor Co. (New York); Endangered Species Co. (New York); Carbone 14 (Canada); Mark Morris (New York); John Kelly (New York); Jennifer Monson Co. (New York); Ann Carlson Co. (New York); Ellen Fisher; Eric Ryan; Jennifer Miller/Susan Seizer; Pilobolus Dance Theatre (New York); Netherlands Dance Theatre (New York); Folies Bergere (Paris); Anna Halprin Co. (San Francisco); Martha Graham Dance Co. (New York); Susan Marshall Dance Co. (New York); Martha Clark Groups (New York); Garth Fagan Bucket Dance Theatre (New York).

[14] Judge Posner was referring to the finding by the district judge that the striptease dances concerned were " . . . [n]ot expressive activity," but "mere conduct," *Miller* (*En Banc*), *supra*, 904 F.2d at 1090. (Pet. App. 18).

C. NUDITY, AS AN INTEGRAL PART OF 'PERFORMANCE DANCE' DOES NOT RESULT IN A REMOVAL OF CONSTITUTIONAL PROTECTION.

> *The noblest in art is the nude.* This truth is recognized by all, and followed by painters, sculptors and poets; only the dancer has forgotten it, who should most remember it, *as the instrument of art is the human body itself.*

Duncan, I., *The Art of the Dance*, quoted in *The Art of the Dance*, edited by Cheney, S. (1969) p. 38 (emphasis added).[15]

Eroticism and nudity as an integral part of dance has a history that dates back to the beginning of dance itself. See generally, Cheshire, *Eroticism in the Performing Arts* in Webb, *The Erotic Arts*, 297 – 306 (rev. ed. 1983); Marks, J., *A Pictorial History of the Dance* (1962).

The fact that in the intended performance dance at issue here, and as an integral part of the dancer's expression, nudity occurs, has been repeatedly recognized by this Court to be of no moment to the protection which otherwise applies. "[N]udity alone does not place otherwise protected material

---

[15] Isadora Duncan went on to express in this article at 43-44:

> Dancing expresses in a different language, different from nature, the beauty of the body; and the body grows more beautiful with dancing. All the conscious art of mankind has grown out of the discovery of the natural beauty of the human body. Men try to reproduce it in sand or on a wall, and painting thus was born. From our understanding of the harmonies and proportions of the members of the body sprang architecture. From the wish to glorify the body sculpture was created. The beauty of the human form is not chance. One cannot change it by dress. The Chinese women deformed their feet with tiny shoes; women of the time of Louis the XIV deformed their bodies with corsets; but the ideal of the human body must forever remain the same. The Venus "of" Milo stands on her pedestal in the Louvre for an ideal; women pass before her, hurt and deformed by the dress of ridiculous fashion. Yet she remains forever the same, for she is beauty, life, truth. It is because the human form is not and cannot be at the mercy of fashion or the taste of an epoch that the beauty of woman is eternal. She is the guide of human evolution toward the goal of human race; toward the ideal of the future which dreams of becoming God.

outside the mantle of the First Amendment." *Schad, supra*, at page 66, citing *Jenkins, supra*. "Furthermore, as the [circuit] court in this case recognized, nude dancing is not without its First Amendment protections from official regulation." *Schad, supra*, at 66, citing *Doran, supra*; *Southeastern Promotions, supra*; *California v. La Rue, supra*.

The State of Indiana seeks to prohibit an entertainment program merely because it includes "nudity". *Schad* makes it clear that such a prohibition is violative of the First Amendment.

As recognized by Judge Flaum, writing for the majority below, this Court's decisions in *La Rue*, and *Doran* "[c]an be reconciled only on the implicit assumption that the regulated activity, topless dancing, was protected by the First Amendment. Otherwise, the State's police power would be sufficient to support the statute in both cases." *Miller (En Banc), supra*, 904 F.2d. at 1083 (Pet. App. 5).

Performance dance is unquestionably expressive. The expression is the type of speech that is protected by the First Amendment. That protection is not lost simply because the performance includes nudity. The conclusion becomes inescapable, therefore, that the Indiana public indecency statute is unconstitutional as applied to nude dancing.

D. CONSTITUTIONAL PROTECTION OF PERFORMANCE DANCE, MUSIC, ABSTRACT ART, ETC. CANNOT BE MADE TO DEPEND UPON WHETHER SUCH EXPRESSION EVIDENCES A "PARTICULARIZED MESSAGE" REASONABLY LIKELY TO "BE UNDERSTOOD."

1. *Spence* and *Johnson* analysis does not apply.

The state asserts that pursuant to this Court's decisions in *Spence v. Washington, supra*, and *Texas v. Johnson*, 491 U.S. ___, 105 L.Ed.2d 342 (1989), the activity at issue (nude/semi-nude performance dance) is not imbued with sufficient communicative elements to bring it within the ambit of the First Amendment, unless there is an "intent to convey a particularized message" and a great likelihood that "the message

would be understood by those who viewed it." *Johnson, supra*, 105 L.Ed.2d at 353, citing *Spence, supra*, at 410-411. However, the state has cited to not a single decision of this Court that has applied this test to the arts, as opposed to alleged 'symbolic speech' that is otherwise inherently pure conduct.

The application of *Spence* has been limited to those circumstances where activity, which is inherently conduct *only*, is asserted to be occurring in a context in which the activity itself is the speech. By use of the test, courts are able to determine whether or not such conduct, given the "[f]actual context and environment in which it was undertaken," *Spence, supra*, at 410, was sufficiently infused with expression so as to conclude that it was "speech," thus bringing it to the threshold level of applying First Amendment analysis to the review of the proscription. It is the initial threshold inquiry "[t]o determine whether [the individuals] activity was sufficiently imbued with elements of communication to fall within the scope of the first and fourteenth amendments." *Spence, supra*, at 409 (clarification added).

This is so because "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.*, at 409, citing from *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (clarification in original).

The rule laid out in *Spence* and *Johnson* is used to handle those "arguable" situations where the activity is inherently "conduct", yet asserted to be undertaken to convey a particularized message. No such analysis is either necessary or appropriate when the activity (here, erotic dance) is inherently expressive. See *Ward, supra*.

To argue, as the state does, that there was no attempt to communicate nor that there was any "particularized message," misses the point by attempting to mechanically analyze the communicative element, for " . . . [a]rt is not to be understood, as we use the term, but is to be *experienced*." Graham, Martha, *A Modern Dancer's Primer for Action* (1941), as quoted in *Dance: A Basic Educational Technique*, edited by Rogers, F. (1980) (emphasis added).

> In its essentials, dance is the same over the entire world. The essentials are its function, which is communication; its instrument, which is the body; and its medium, which is movement.
> * * *
> No art ignores human values, for therein lie its roots. Directed by the authentic or perverted magnificence, which is man's spirit, movement is the most powerful and dangerous art medium known. This is because it is the speech of the basic instrument, the body, which is an instinctive, intuitive, and inevitable mirror revealing man as he is.

Id., at 46 and 47.

It truly would be a unique determination in a free society to conclude that performance dance is devoid of constitutional protections because the public, or even art critics, may not perceive or understand (or disagree with) the artists' "message," purpose or intent. This Court has never denied constitutional protections to art forms on the simple basis that some, or most may not perceive a "particularized message."

2. Even if applicable, nude performance dance is protected speech under *Spence* and *Johnson*.

Even assuming, arguendo, that a *Spence* analysis would apply to performance dance, the evidence below establishes such a test to have been met. Gayle Sutro's affidavit indicates that her dance performances were "appropriately choreographed and are *an attempt to communicate* as well as to entertain." (J.A. 14) (emphasis added). Thus, the "intent" requirement is fulfilled. The state, however, argues that Gayle Sutro "never revealed *what she wanted to communicate*" (and thus being fatal to her fulfilling the first part of the *Spence* test (Pet. Br. 17)). The state is in error, for it is the dance performance itself, consisting of its constituent emotion, intensity, and visual display, that is the "message."

To inquire further is to ignore the emotive component in art noted by this Court in *Ward*, which is not necessarily adaptive to a particular verbal description. If required to do so in *Ward*, this Court might well have had great difficulty in

articulating the "particularized message" of the rock music that it found to be constitutionally protected expression there. In addition, as noted by Judge Flaum in the majority opinion of the Seventh Circuit below, it is reasonably apparent that this message would be understood, as those who view the respective dances "advance currency to view them." *Miller* (*En Banc*), 904 F.2d at 1087 (Pet. App. at 12). Therefore, even if this Court finds a *Spence* analysis to be applicable to art, the record below illustrates that this test has been met here.

II.

THE INDIANA PUBLIC INDECENCY STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE PERFORMANCE DANCE OF THESE RESPONDENTS.

A. IF UPHELD TO PRECLUDE THE PERFORMANCE DANCE AT ISSUE, THE INDIANA PUBLIC INDECENCY STATUTE WOULD EFFECTUATE A TOTAL BAN ON CONSTITUTIONALLY PROTECTED EXPRESSIVE NUDITY.

The state argues that even if the performance dance here at issue is expression of a type protected by the First Amendment (and therefore falls within the *Baysinger* exception), the Indiana public indecency statute is nonetheless constitutionally valid as applied, as being either a content-neutral time, place, or manner regulation, or as a facially neutral statute incidentally limiting First Amendment rights.[16] This argument is a non-sequitur, however, as it not only ignores,

---

[16] As these issues were never raised by the state either in its pleadings or various arguments below, they are deemed waived. See Judge Posner's concurring opinion (slip opinion p. 44-45). Since the Seventh Circuit's own decisions make it clear that an issue not raised is waived, *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989), it is difficult to argue that the Seventh Circuit erred by following its own precedent in declining to substantively address these issues. In addition, this Court has indicated the impropriety of considering issues never raised or addressed below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *FW/PBS v. Dallas*, 493 U.S. ___, 107 L.Ed.2d 603, 617 (1990), citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam).

but, in fact, directly contradicts the position taken by the state in the lower courts and which it asserts here; that being, that the limiting construction by the Indiana Supreme Court in *Baysinger* construes the statute (in order to save it from being struck down as facially overbroad) so that it does *not* apply to an expressive performance which should be, and is, otherwise protected by the First Amendment.[17]

What the state fails to recognize is that its foundational presumption to discuss whether the questioned statute could be constitutionally applied under either of the legal theories (i.e., that Respondents' performance dance is " 'expressive' and therefore entitled to some protection as speech under the First Amendment . . . ", Pet. Br. 26), consequently also presumes that the Respondents' conduct falls within the *Baysinger* exception. Yet, having made those concessions, the state asserts that nude or semi-nude performance dance should *still* be able to be precluded under the public indecency statute, by considering that statute as either a time, place or manner regulation or a facially neutral statute.

To accept application of one or both of these legal tests to these circumstances is, however, to effectively overrule the *Baysinger* exception. For if the constitutionality of the statute is upheld by this Court under either of these arguments

---

[17] Of course, to the extent that this Court would construe a proscription of nudity across the board as being a constitutionally valid statute (under any legal theory), there would be no legal impediment to governmental entities across the country expanding the proscription of "live" nudity to include a proscription of nudity of any kind, including that appearing in films, books and magazines. Indeed, the state argued below, as noted in Judge Posner's concurrence, that it could apply its public indecency statute to the public display (as defined in *Baysinger, supra*) of videotapes of the dance performances at issue, such as the videotape submitted by the Darlene Miller Respondents (Supplement to Joint Appendix). *Miller* (*En Banc*), *supra*, at 1103-1104 (Pet. App. 45-46) (the state apparently now recants from this position – see Pet. Br. 23). This marked extension would destroy the stringent protections to be afforded presumptively protected material as set forth by this Court's numerous decisions in the area of obscenity, and would render meaningless this Court's repeated observations that nudity alone does not serve to deprive material of its otherwise existing constitutional protections.

asserted by the state, *Baysinger* will fail to carry any continuing validity. Nudity will be prohibited in *any* "public place" (as broadly defined by the Indiana Supreme Court in *Baysinger, supra*), even in a context where it may be part of some "larger form of expression of ideas." This result is inevitable, since, if this Court finds the performance dance here to be protected "expression," which it must, or at least assume, for consideration of either of these tests, then performance dance properly falls within the *Baysinger* exception, and should be exempted from prosecution under the public indecency statute pursuant to the state court's limiting construction. However, allowing application of the statute to this otherwise properly protected expression (by either of the legal theories now asserted by the state) leaves the *Baysinger* exception meaningless.[18]

This result would have two impermissible effects. First, the state court's authoritative construction of one of its own statutes will have been voided. As this Court has long noted, it is the duty of this Court to accept state judicial construction of their own (state) laws. *Shuttlesworth v. City of Birmingham, supra*, at 91, and cases cited therein. By removing the scope of the *Baysinger* exception, this Court destroys the protections afforded by the state court limiting construction. Similarly, both the district and circuit courts below properly construed the state court's limiting construction in *Baysinger*. See, for example, n. 4, *supra*. This Court has noted its deference to statutory construction interpretation by the lower federal courts.

> Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.* 472

---

[18] It is for this reason, most likely, that these issues were never raised by the state in the lower courts; it being implicit that if the performance dance at issue was expression, the public indecency statute could not constitutionally be applied to it. See n. 4, *supra*.

> U.S. 491, 499-500, (1985). See *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988), ('This Court rarely reviews a construction of state law agreed upon by the two lower federal courts').

Frisby v. Schultz, supra, at 482 (clarification added). This Court should not usurp the proper interpretation made by the federal courts below, let alone abrogate state court construction.

Second, without the *Baysinger* exception, the Indiana public indecency statute would suffer from the same unconstitutional defect as found by [now Chief] Justice Rehnquist in *Doran, supra*:

> The District Court observed, we believe correctly:
>
> > "The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance."

Id., at 933, citing *Salem Inn, Inc. v. Frank*, 364 F.Supp. 478, 483 (E.D. N.Y. 1973).

The effect of such an analysis here (allowing application of a "time, place, or manner" or "neutral statute" theory in consideration of the constitutionality of the questioned statute), would be to allow the preclusion of nudity at all times, in all public places, and under all circumstances (as was the case in *Doran, supra*), thereby prohibiting nudity, in the words of Judge Posner "across the board . . . ". *Miller* (*En Banc*), *supra*, at 1103 (Pet. App. 44). The result would be unquestionable facial overbreadth of the statute.[19] As this

---

[19] This should not be construed to disparage or to ignore Respondents' asserted position in this litigation for the past five years, that, notwithstanding any

(Continued on following page)

Court has long noted, when First Amendment rights are implicated, "[p]recision of regulation must be the touchstone . . . ". *Interstate v. Dallas*, 390 U.S. 676, 682 (1968), citing *NAACP v. Button*, 371 U.S. 415, 438 (1963). The statute would, therefore, just as easily apply to the stage production of "Hair" or any other play or performance that should properly fit within the *Baysinger* exception, and would allow for a total restriction of nudity regardless of any "expressive" purpose.

This Court should give proper constitutional deference to the Indiana Supreme Court's limiting construction of the public indecency statute, and not usurp the function of the state's highest appellate court to construe its own statutes. To void the Indiana limiting construction would result in a hopelessly overbroad statute.

(Continued from previous page)

construction by the Indiana Supreme Court in *Baysinger, supra*, the Indiana public indecency statute is overbroad *on its face*. Indeed, the district court below, in its initial decision on the Glen Theatres matter found the statute to be facially overbroad. *Glen Theatre, Inc. v. Civil City of South Bend*, 728 F. Supp. 728 (N.D. Ind. 1985). The Seventh Circuit, in its first decision, reversed, finding that this Court's dismissal of *Baysinger* for want of a substantial federal question in *Clark* and *Dove, supra*, bound the federal courts to a determination that the Indiana public indecency statute was not overbroad on its face. The circuit court, however, remanded for the consideration of whether the statute was overbroad *as applied* to the performance dance here at issue. *Glen Theatres Inc. v. Pearson, supra*, at 789-791. (Pet. App. 146-147). Yet, a simple examination of the statute reveals that it is, unquestionably, facially overbroad, in that it allows criminalization of dress that falls far short of total nudity, and applies in circumstances that clearly are not properly subject to criminal proscription. For example, a woman wearing a thong bikini on a beach, which does not "totally" cover the buttocks, is a criminal act. A model in an art class at a University, if totally nude or "nude" within the statute, can be prosecuted. A male dancer in a ballet, wearing tights in which his genitalia may be in a "discernably turgid state" can be prosecuted, even though *fully* and opaquely dressed, and, of course, anyone caught nude (as statutorily defined) in the local Y.M.C.A. shower had better seek out legal counsel immediately. As this issue was raised below, and as Respondents may assert proper theories to support affirmance of the decision below, *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6 (1970), these Respondents do not waiver from their initial contention that the Indiana public indecency statute is overbroad on its face, and is therefore unconstitutional.

B. INDIANA'S PUBLIC INDECENCY STATUTE DOES NOT QUALIFY AS A CONTENT-NEUTRAL REASONABLE TIME, PLACE OR MANNER REGULATION

1. This statute is not content-neutral.

In its application to expression, the Indiana public indecency statute specifically prohibits that component of expression which may be considered "nudity" as defined in the statute. The evidence below substantiates that nudity and the removal of clothing was an "integral part" of Gayle Sutro's dance performances. J.A. 14. As this Court has noted, the "principle inquiry in determining content neutrality" is whether the government has adopted a regulation "because of disagreement with the message it conveys." *Ward, supra*, at 675, citing *CCNV, supra*, at 293. In evaluating this concern, the "government's purpose is the controlling consideration." *Ward, supra*, at 675. "Content-neutral" restrictions are those that "are *justified* without reference to the *content* of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988), citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis in original and emphasis added).

The justification for the statute here is quite simple; it is to *totally preclude "public nudity,"* a concept that the state finds to be offensive. It would, of course, however, be incredulous to argue that the statute is content neutral if it applies to some nude dancing, but not to other such performances. Yet, while this statute facially appears to apply to *all* public nudity (and thus all "public" nude dancing), as construed by the Indiana Supreme Court, the public indecency statute has quite a different result. Under the *Baysinger* construction, the statute does not apply to "nudity as part of some larger form of expression meriting protection . . . ". *Baysinger, supra*, 397 N.E.2d at 587. Therefore, it would not arguably apply to nude dancing as part of a ballet or theatrical production. The state acknowledges such. Pet. Br. 22, 24-25. The state does seek, however, to apply this statute to the nude and semi-nude

dance at issue here. There can be no other conclusion, therefore, but that the statute discriminates among nude dancing *specifically* on the basis of the *content* of a performance. As such, it is *not*, by definition, content-neutral. If a dance is performed in a context in which the state finds agreeable, it will not be prosecuted. However, if the state disagrees with the content of the performance, it will not be protected.

This Court has consistently indicated that offensiveness of, or disagreement with expression is not a valid basis to revoke otherwise presumptive First Amendment protections. *Texas v. Johnson, supra*, 105 L.Ed.2d at 360; *Erznoznik, supra*, at 209; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), citing *Carey v. Population Services International*, 431 U.S. 678, 701 (1977).

In *Erznoznik, supra*, this Court considered the facial validity of a Jacksonville, Florida ordinance that prohibited drive-in movie theatres, without proper screening, from showing films that "contained *nudity*." *Erznoznik, supra*, at 206 (emphasis added). This ordinance, the Court found, discriminated among movies "solely on the basis of *content*."[20] *Id.*, at

---

[20] As a footnote to this observation (*Erznoznik, supra*, at 211 n.7), this Court noted that scenes of nudity in a movie were different from public nudity "traditionally subject to indecent-exposure laws", as the nudity in a film must be considered as part of the whole work. In this case, there is no evidence of mere simple "public nudity," but, rather, nudity as an "integral part" of communicative dance performances that are appropriately choreographed. Jt. App. 14. Therefore, the nudity in question here, as was the case in *Erznoznik*, must be similarly "considered as part of the whole work." In addition, the *Erznoznik* footnote cites to a statement by Justice Douglas in dissent in *Roth v. United States*, 354 U.S. 476 (1957), where he opined that "[n]o one would suggest that the First Amendment permits nudity in public places." The state (Br. 23) and *amici* (see, for example, Brief of American Family Assn. et al., at p. 5) rely upon this statement for the general assertion that *even* Justice Douglas, one of the most absolutists on this Court regarding First Amendment rights, would not contend that "public" nudity is protected. However, it is clear from Justice Douglas' opinions that his position was predicated upon the common definition of the term "public place," such as on a street corner, not the all-encompassing definition adopted in Indiana. See, for example *La Rue, supra*, at 121 (Douglas J., dissenting), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (Douglas J., dissenting in part).

(Continued on following page)

211 (emphasis added). The statute at issue discriminates in the same fashion, by precluding, as construed, particular live dancing that contains, as part of its content, nudity. As this Court noted in *Erznoznik*:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*. . . . Thus, 'under the Equal Protection Clause, not to mention the First Amendment itself,' . . . *even a traffic regulation* cannot discriminate on the basis of *content* unless there are clear reasons for the distinctions.

Id., at 215 (emphasis added, citations omitted).

As the majority opinion of the Seventh Circuit below noted, the stated purpose (by Indiana) of the public indecency statute was the protection of "public morality generally, and the family structure in particular." *Miller (En Banc)*, *supra*, at 1088 (Pet. App. 14). The court then concluded:

> In meeting this intended goal, the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's proscribed vision. As such, it is *directly* related to the suppression of free expression.

Id., at 1088 fn. 7 (Pet. App. 14-15 fn. 7) (emphasis in original).[21]

(Continued from previous page)

Therefore, it is misleading to imply that the statement of this Court in the *Erznoznik* footnote regarding the limitation of public nudity "*traditionally* subject to indecent – exposure laws" is applicable in these circumstances.

[21] This is not, necessarily, to say that a state may not legislate on the basis of morality. Note, although, *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 688-689 (1959). However, such an observation adds nothing to the consideration of whether a specific regulation may be "content-neutral," when it seeks to regulate or preclude *expression* (or a hybrid of expression and conduct), as opposed to *pure* conduct, on the basis of normative moral judgments.

In addition, the "governmental interests" asserted by the state *here* (in support of the public indecency statute) similarly illustrate that this statute cannot be analyzed as a "content-neutral" regulation. Again, the state recites the interest of the "public morality," including the "discouragement of adultery and divorce" (Pet. Br. 31), and, since those governmental interests did not prevail in the Seventh Circuit, the state further raises, for the first time,[22] the interests as noted by Judge Coffey in his dissent below including:

> Public nude *dancing* is damaging to society and citizens by *degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal activity.*

Pet. Br. 37 (emphasis added).[23]

---

[22] As noted previously (n. 16, *supra*), since not raised below, these arguments are deemed waived. In addition, it is of no assistance to rely upon, as does the state here, "*possible*" legislative reasons that Judge Coffey believed "should be self-evident to an educated man or woman." Pet. Br. 31. As addressed above, in determination of content neutrality, "the government's purpose is the controlling consideration." *Ward*, *supra*, at 675. Thus, content-neutrality is not to be determined on the basis of *any "possible"* governmental interest, not particularly expressed, but, rather, is evaluated against specifically articulated concerns that served as the underlying basis for the statute. This Court should quickly question the importance or necessity of any governmental interest that the state itself has never before asserted. Indiana appears to be "throwing everything against the wall, hoping something will stick."

[23] Of course, none of these concerns find any support in the record, whatsoever. In fact, the affidavit of Roger Judd filed below notes that, to his knowledge, "no person has been arrested at the Chippewa Bookstore for any criminal act other than a violation of Indiana's Public Indecency Law, I.C. 35-45-4-1, with the exception of one patron who was arrested for burglary." J.A. 16-17. It is also of interest that the state argues over and over again, that this statute is not particularly directed to either nude expression or nude dancing, but, rather, only to the neutral consideration of *nudity itself* (Pet. Br. 28-31). The state argues this, of course, so as to not run afoul of this Court's stringent prohibitions of content-based regulations. It is therefore somewhat quizzical to ponder as to how *mere nudity* that is normally subject to the indecent exposure laws, "such as public urination" (*Miller (En Banc)*, *supra*, at 1090 (Posner, J., concurring) (Pet. App. 19)), would be "degrading women as sex objects, encouraging prostitution, and increasing sexual assaults, and attracting other criminal activity." Judge Coffey, in dissent, apparently attempts to read into the statute a particular purpose for limiting *nude performance dancing* that the state vehemently argues is *not* the intended goal of the statute to so single out.

These governmental interests all presume a negative *impact* of *performance dance* on the *viewer*. As this Court recently noted:

> Regulations that focus on the direct impact of speech on its audience present a different situation [from the "secondary effects" argument as found in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 431 (1986)]. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the *psychological damage* it felt was associated with viewing adult movies, that analysis of the measure as a *content-based statute would have been appropriate*. The hypothetical regulation targets the *direct impact* of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Boos, supra, at 321 (clarification and emphasis added).

Thus, if the governmental interests asserted by the state are directed at the *impact* of the performances upon their audience (which, given the state's reliance upon Judge Coffey's position, they appear to be), the statute may not be analyzed as "content-neutral," but, rather, must be considered to be a content-specific regulation.[24] Such a content-specific

---

[24] The state argues in its brief that "[t]hese interests are 'unrelated to the suppression of free expression,' unless the right to express an 'emotional theme of eroticism and sensuality' includes the right to *advocate adultery*, licentiousness, prostitution, and other crime." (Pet. Br. 37) (emphasis added). However, this Court has noted that the Constitution does, indeed, protect "advocacy of the opinion that *adultery* may sometimes be proper, no less than advocacy of socialism or the single tax." *Kingsley International, supra*, at 689 (emphasis added). Of course, it can be argued that advocacy is one thing, but actual conduct (albeit expressive) is quite another. For example, these Respondents would never contend that any dance performance could contain certain other conduct that could be otherwise prosecuted under the criminal code, such as actual sex acts, rape, or even murder, simply because they are in the context of an "expressive" performance. Clearly, the overriding governmental interests in the protection against this type of conduct occurring *anywhere*, including even in an artistic performance, outweigh any asserted First Amendment right. However, this Court has consistently noted that

(Continued on following page)

statute, to pass constitutional muster, must be necessary to a compelling governmental interest. For the reasons as set forth in Section II(D), *infra*, the Indiana public indecency statute fails that test as well.

2. Even if content-neutral, the Indiana public indecency statute is not a valid reasonable time, place or manner regulation.

Assuming, arguendo, that the statute in question can be considered to be "content-neutral," that observation, in and of itself, does not equate to constitutionality. In addition to being "justified without reference to the content of the regulated speech," to pass constitutional muster, a time, place or manner regulation must be "reasonable" in that it must be "narrowly tailored to serve a significant governmental interest", and must "leave open ample alternative channels for communication of the information." *Ward, supra*, 105 L.Ed.2d at 675, citing *CCNV, supra*, at 293. This statute fails in both respects, and is thus unreasonable.

As noted by this Court, a regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward, supra*, at 680, citing *United States v. Albertini*, 472 U.S. 677, 689 (1985).

While this Court has noted that a "least restrictive means" analysis is not required in such circumstances, it has been added, however:

> To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Ward, supra, at 681.

(Continued from previous page)

simple nudity has no such overriding governmental interest, as nudity alone will not deprive expression of its presumptive constitutional protection. *Schad, supra*, at 66, and cases cited therein.

In addition, the regulation at issue is not merely a "time, place or manner regulation," but, rather, works to be a total prohibition. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, *supra*, at 485. From this Court's observations that not all nudity, *even to minors*, can be prohibited, *Erznoznik*, *supra*, at 213, it seems ridiculous to argue that it is necessary to ban *all* nudity in order to preclude whatever may be considered to be the alleged "appropriately targeted evil."

It is, of course, helpful in this consideration to leave the area of *speculation* of the "appropriately targeted evil," and to consider, reasonably, what may have been the *actual* purpose of the public indecency statute. Corpus Juris Secundum notes the purpose of "indecent exposure" laws to be "to protect the public from shocking and embarrassing displays of sexual activity . . . ". 67 C.J.S. *Obscenity* § 10, at 49-50 (1978). It is, therefore, to protect the *unconsenting* public from conduct that may be offensive to them.[25]

However, given the Indiana Supreme Court's interpretation of the statute, it is questionable whether the statute is even *related* to the governmental interests raised (or the more reasonably argued interest to protect the unconsenting public), let alone whether those governmental interests would be achieved less effectively absent the regulation. Because of the *Baysinger* exception, a theatrical performance, such as the Dance of the Seven Veils in Strauss' *Salome*, including full nudity, could be displayed in *any public place*, including areas that may effect both the unwanting public and minors, such as on a street corner. Given this exception, it is difficult to understand how "public morality" or the other asserted or implied governmental interests could be served by allowing

---

[25] In fact, the indecent exposure statute of the State of Arizona allows prosecution *only* in such circumstances where the defendant is reckless about whether other persons "would be offended or harmed by the act." A.R.S. § 13-140(A). It is, therefore, somewhat ironic that the State of Arizona would file an *Amius* brief in this matter, since the circumstances at issue here, where the performances are limited to a *consenting* audience, would not violate Arizona law.

such a display under those circumstances, while precluding an expressive dance performance that was restricted to a consenting adult audience that was performed indoors.

Indeed, in considering the constitutionality of an ordinance that banned all picketing, with the exception of labor picketing, this Court has noted that "[i]f some groups are exempted from a prohibition on parades and pickets, *the rationale for regulation is fatally impeached.*" *Carey v. Brown*, 447 U.S. 455, 465 n. 9 (1980), citing *Young v. American Mini Theatres, Inc.*, *supra*, at 67 n. 27 (opinion of Stevens, J.), quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29 (emphasis added). Similarly, here, because of the exceptions to the statutory proscription of nudity not only required by *Baysinger*, but also admitted by the state as to the selective enforcement of the statute (exempting from prosecution what the state perceives to be "legitimate" art-discussed *infra*), the rationale for the regulation becomes "fatally impeached," and the public indecency statue is, thus, not narrowly tailored.

Nor does the statute leave open "ample alternative channels for communication." The statute is an outright, total prohibition, and the *content* of the performance is clearly different without the element of nudity. Nude performance dancing (or performance dance that contains some nudity) simply cannot be performed *without nudity*.

The state argues, however, that the public indecency statute does not unreasonably limit alternative avenues of communication because "any alleged 'erotic message' of the barroom dancer can be communicated just as effectively in scanty apparel as total nudity. The plaintiffs in this case have never asserted otherwise." Pet. Br. 40.

First, the state argues no basis for its conclusion that the message can be communicated "just as effectively" in clothing as in the nude. Gayle Sutro's affidavit, in fact, indicates quite to the contrary. J.A. 14. In addition, a simple example shows the fallacy of this statement. It would be difficult to deny that the content of the expression of "message" as found in Michelangelo's David would not be markedly different with a governmentally required loin cloth over

the abdominal area of the statue. It is, in part, the controversy over the nudity as contained within the figure itself that has engendered such debate and interest of the sculpture throughout the centuries.

Second, it is somewhat disingenuous for the state to argue that the Plaintiffs had never "asserted otherwise," since the state had never *raised* the application of this legal analysis (a "reasonable time, place or manner restriction") either as an asserted defense in its pleadings, or in its numerous briefs and arguments to the district and circuit courts below.

The State's assertion that the public indecency statute is a mere "manner" regulation is similarly unavailing. As noted above, it is not the "manner" that is being regulated (as was the case in *Ward, supra* [volume of rock music], or *Kovacs v. Cooper*, 336 U.S. 77 (1949) [sound trucks]), but it is rather a prohibition of particular *content*.

> [The government may not] proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the *communicative nature* of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."

Texas v. Johnson, supra, 105 L.Ed.2d at 355, citing *CCNV v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd sub nom. *Clark v. CCNV, supra* (emphasis and clarification in original and added).

In addition, in evaluating the reasonableness of a manner regulation, it must be determined whether the expression is "basically incompatible with the normal activity of a particular place at a particular time." *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 763 (1988), citing *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Not only is the performance dance at issue here not "basically incompatible" with the normal activity of Respondents' business establishment, it is, rather, *particularly appropriate* there. As the record establishes, the Chippewa Bookstore is totally

enclosed, and limited to consenting adult patrons. 695 F.Supp. 414, at 419 (Pet. App. 131). The type of performance dance involved here is most appropriate in such a setting that serves a governmental interest in precluding nude performance dancing from being viewed by or cast upon minors or the unconsenting public.

Finally, this Court has long held that time, place and manner regulations are invalid if they invite arbitrary application as a means of suppressing particular expression. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981), and cases cited therein. If a statute vests such broad discretion in public officials that allows the government to determine which expression will be permitted and which will not, the result is to sanction "a device for the suppression of the communication of ideas and permits the official to act as censor." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). In addition to violating the First Amendment, such arbitrary discretion similarly affronts the equal protection clause of the Fourteenth Amendment. *Id.* The remarks of the state below leave no question but that application of this statute, if constitutionally validated as a reasonable time, place or manner regulation, would be left to the unfettered, and more importantly, standardless discretion of the government.

As pointed out by Judge Posner, at argument before the *En Banc* panel of the Seventh Circuit, the state asserted that the application of the *Baysinger* exception was to only "'established' works of art". *Miller* (*En Banc*), *supra*, at 1098, 1104 (Pet. App. 34, 45-46). Therefore, the State of Indiana seeks to discriminate among expressive art based upon its *own* standardless and arbitrary conception as to what *the state itself* may consider to be "legitimate," or, more particularly, "established" art. Even belly dancing, the state argued below, could be banned because, as observed by Judge Posner, it is "not certified high art." *Miller* (*En Banc*), *supra*, 904 F.2d 1104 (Pet. App. 46). The discriminatory enforcement is further supported by the affidavit of Sergeant Timothy J. Corbett, who averred: "No arrests have ever been made for nudity as part of a play or ballet." J.A. 18-19.

Thus, to uphold the constitutionality of this statute is to allow the state to apply the public indecency law of Indiana in the very manner that the state desires; at the subjective, standardless, and unfettered discretion of prosecutorial authorities who may themselves determine what is "established" or "legitimate" art. As noted in *Heffron* (and the cases cited therein), such circumstances are unquestionably unconstitutional.

Therefore, even if the Indiana public indecency statute can be considered to be "content-neutral," it fails to comply with the other constitutional requirements to be a reasonable "time, place or manner" regulation.[26]

C. THE PUBLIC INDECENCY STATUTE IS NOT A VALID LAW OF GENERAL APPLICABILITY, ONLY INCIDENTALLY AFFECTING FIRST AMENDMENT RIGHTS.

If not a content-neutral time, place or manner regulation, the state asserts that the Indiana public indecency statute is a

---

[26] The state also relies upon this Court's four-part test as set forth in *United States v. O'Brien*, *supra*, in support of a legal theory to uphold the constitutionality of this statute. Pet. Br. 27, 35-38. That test is set forth at page 36 of the state's brief, and need not be repeated here. As noted by this Court, the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *CCNV*, *supra*, at 298. Therefore, for the reasons in this subsection above that establish that the Indiana public indecency statute is not a reasonable time, place or manner regulation, this statute cannot be saved by an *O'Brien*-type analysis. In addition, in *O'Brien*, this Court noted that a "sufficiently important governmental interest" in regulating the non-speech element (there, burning draft cards), can, under some circumstances, justify the incidental limitations on First Amendment freedoms. *O'Brien*, *supra*, at 376-377. *O'Brien*, however, dealt with conduct that was not implicitly integral to the expression. Here, however, the nudity is "intimately related to expressive conduct" in that it is an integral part of the dance performance and the expression therein, and, as such, cannot be sustained upon an *O'Brien* type analysis. *Arcara v. Cloud Books*, 478 U.S. 697, 706 n. 3 (1986), and cases cited therein, and at 709-711 (Blackmun, J., dissenting). Even if the nudity involved herein can be considered to be some type of separable "non-speech" element, this Court has repeatedly indicated that that factor (nudity), by itself, will not take otherwise protected expression (here, performance dance) out of the mantle of the First Amendment. *Schad*, *supra*, at 66. This Court has noted no such qualifications for burning draft cards as was the case in *O'Brien*.

constitutionally valid criminal law of general applicability, only incidentally affecting First Amendment rights, citing *Employment Division v. Smith*, 494 U.S. ___, 108 L.Ed.2d 876 (1990). As *Smith* is a "free exercise" decision of the *religion clauses* of the First Amendment, it is inapplicable to the consideration of the issues before this Court. In fact, this Court noted in *Smith* that "neutral generally applicable" laws affecting free exercise of religion *have been invalidated* when challenges have also been predicated upon the free speech and press clauses of the First Amendment. *Smith*, *supra*, 108 L.Ed.2d at 887. However, a neutral statute analysis may, under the proper circumstances, be applied in the freedom of speech context as well. *CCNV*, *supra*.

The cases relied upon by the state, however, have one, although important, distinction from the case at issue. They all involve the government's ability to control the use of its own property. In *CCNV*, this Court was concerned with a park service regulation that prohibited camping in certain of its parks. In *Albertini*, *supra*, the issue involved the government's ability to preclude certain speech on a military base. Similarly, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, the complete ban allowed there was narrowly tailored as it only banned signs on "public property."

As stated in a slightly different context, the government's "attempt to restrict free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interest of a government in overseeing the use of its property." *Consolidated Edison Company v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980). This is so because "[i]t is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when . . . " the government acts as proprietor "to manage [its] internal operation[s] . . . ". *United States v. Kokinda*, 497 U.S. ___, 111 L.Ed.2d 571, 580 (1990) (plurality opinion), citing *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961) (clarification in original and added).

In addition, none of the cases cited have the effect of being a total, all encompassing ban of certain expression at all times, in all circumstances, and in all places. Application of this legal doctrine to these circumstances would have just that effect. Even in *Frisby v. Schultz*, *supra*, (cited by *amici* National Governor's Association et al. [Br. 25] for the proposition that a "complete ban" could be narrowly tailored so as to allow the constitutional application of this legal theory to totally prohibit speech), there were alternative channels of communication available, as the picketing under the regulation there, as construed, was limited only to conduct "taking place solely in front of a particular residence." *Id.*, 101 L.Ed.2d at 431. Picketing was not prohibited in other circumstances. Therefore, application of this legal theory to this case is inappropriate.[27]

D. THE CONSTITUTIONALITY OF THE INDIANA PUBLIC INDECENCY STATUTE MUST BE EVALUATED PURSUANT TO STRICT SCRUTINY.

For the reasons set forth above – that the Indiana public indecency statute is neither a reasonable content-neutral time, place or manner regulation nor a neutral criminal statute only incidentally affecting First Amendment rights – and since the

---

[27] The state also implies (Pet. Br. 17), and *amici* American Family Association, Inc., et al. argues (Br. 15-17) that the dance performance at issue here was for a commercial purpose, and therefore should be analyzed under a lower level of scrutiny as is appropriate to "commercial speech." However, this argument confuses speech that may make a profit with "commercial speech." This Court has long held that profit motive makes no difference in First Amendment analysis. *Joseph Burstyn, Inc., supra*, 501-502. The setting of a bookstore or commercial theatre are presumptively protected under the First Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). See also *Heffron*, *supra*, at 647, and cases cited therein. The cases cited by *amici* relate to *advertising*, or more particularly, as phrased by this Court, speech "proposing a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, *supra*, at 64. The speech and expression at issue here was not any proposition of or for a commercial transaction, and, therefore, does not fit within this Court's category of "commercial speech." To accept *amici's* argument would be to lower the level of scrutiny of any speech or expression for which monetary compensation may be paid to receive, including every movie, video, and book. Such an argument is clearly ludicrous.

state has asserted no other basis upon which to consider this statute under an intermediate level of scrutiny, First Amendment (strict) scrutiny should be utilized to evaluate the constitutionality of this statute. *Sable Communications*, *supra*, 106 L.Ed.2d, at 105.

Under such scrutiny, "an absolute prohibition on a particular *type* of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983), citing *Perry Education Assn. v. Perry Local Educators' Assn.*, *supra*, at 46 and *Widmar v. Vincent*, 454 U.S. 263 (1981) (emphasis added). Thus, the regulation must be "necessary" to serve a "compelling" state interest. *Perry*, *supra*, at 45 and *Boos*, *supra*, 99 L.Ed.2d at 345. In addition, "narrow tailoring" in a strict scrutiny analysis requires this Court to determine whether the regulation is the "least restrictive means" available to accomplish the compelling governmental interest. *Boos*, *supra*, at 329, citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n. 6 (1986) (plurality opinion); *Sable Communications*, *supra*, 106 L.Ed.2d, at 105. For the reasons that the questioned statute does not pass constitutional muster under an intermediate level of scrutiny – that is, that it does not *serve* a *substantial* governmental interest (see Section II(B)2, *supra*) – this criminal proscription is obviously not *necessary* to a *compelling* governmental interest.

In addition, the government may surely constitutionally impose less restrictive regulations based upon whatever governmental interest it may assert. For example, the government could restrict nudity outdoors or, under the appropriate circumstances, where it could be seen by minors, predicated upon the overriding governmental interest of the protection of the unconsenting public and minors. In addition, the government can outlaw [and it has] that nudity that may be obscene. I.C. § 35-49-3-1 through 35-49-3-3.

E. THE TWENTY-FIRST AMENDMENT HAS NOT BEEN RAISED, DOES NOT APPLY, AND, IN ANY EVENT, IS INAPPLICABLE TO THE GLEN THEATRE RESPONDENTS.

The State of Indiana has not raised, in support of the constitutionality of its indecent exposure statute, the state's inherent power pursuant to the Twenty-First Amendment. See *La Rue, supra*. However, acknowledging that this Court may address issues that have not been raised, briefed, or argued relative thereto, *Acosta v. Louisiana Dept. of Health and Human Resources*, 478 U.S. 251 (1986) (Marshall, J., dissenting), Respondents would note that this Court has thus far refused to extend Twenty-First Amendment-*La Rue* type analysis to statutes or ordinances that are not specifically alcohol regulations.

Clearly, the Indiana public indecency statue is not a statute directed at the regulation of alcohol, and is not so limited in its scope. It prohibits all nudity in any "public place", as so defined. However, the recent Eighth Circuit decision of *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990), reh'g *En Banc*, denied, ___ F.2d ___ (8th Cir. 1990), together with the district court's decision in the Miller matter below, upholding the constitutionality of the public indecency statute on Twenty-First Amendment grounds (Pet. Br. 4), calls this limitation into question.

Even assuming that this Court extends state's rights under the Twenty-First Amendment, pursuant to *La Rue* and *Bellanca, supra*, and *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986), to justify this public indecency statute, at least as applied to alcohol regulated establishments, the constitutional claim of these Respondents would be unaffected by this conclusion; for the Chippewa Bookstore does not serve or permit alcoholic beverages on the premises.

Accordingly, while this Court may extend the authority of the state pursuant to the Twenty-First Amendment so as to validate the constitutionality of this statute, such construction could not, in any event, apply to claims of the Glen Theatre Respondents.

CONCLUSION

The Judgment and opinion of the Seventh Circuit, *En Banc*, should be affirmed.

Dated: December 19, 1990

Respectfully submitted,

KLEIN & SHAFER, P.C.

LEE J. KLEIN*
BRADLEY J. SHAFER
Counsel for Respondents, Glen Theatre, Inc., Gayle Sutro and Carla Johnson
4121 Okemos Road
Suite 20
Okemos, MI 48864
517-349-8666

*Counsel of Record

Supreme Court, U.S.
FILED
JAN 3 1991
JOSEPH F. SPANIOL, JR.
CLERK

(19)

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

LINLEY E. PEARSON
Attorney General of Indiana
WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)
219 State House
Indianapolis, IN 46204
(317) 232-6333
Counsel for Petitioners

Graphics LTD - Indianapolis, IN 46202

TABLE OF CONTENTS

I.

A. Prior Decisions of This Court Have Not Held That Nude Barroom-Style Dancing is "Speech" Under the First Amendment 2

B. The Dancing in This Case is Not "Speech"..... 2

C. Nudity Is Not "Speech"..... 5

II.

A. The Decision in *State v. Baysinger* Does Not Preclude a Finding That §35-45-4-1 is Valid As Applied 8

B. The Public Indecency Statute is Content-Neutral As Applied and As Written 10

C. The Public Indecency Statute is a Reasonable "Manner" Restriction on Erotic Dancing..... 14

D. The Issue of Whether Nudity in Erotic Dancing May Be Regulated is Properly Before This Court 14

Conclusion 16

TABLE OF AUTHORITIES

Cases: *Page*

Arcara v. Cloud Books, 478 U.S. 697 (1986)..... 7
Broadrick v. Oklahoma, 413 U.S. 601 (1973)..... 13
Brown v. Socialist Workers '74 Campaign Committee, 459 U.S. 87 (1982)..... 15
California v. LaRue, 409 U.S. 109 (1972) 2
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984)..... 13
City of Canton v. Harris, 489 U.S. 378 (1989) 14-15
City of Dallas v. Stanglin, 490 U.S. 19 (1989)..... 5
City of Renton v. Playtime Theatres, 475 U.S. 41 (1986)..... 11-12
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)..... 4, 11
Covalt v. Carey Canada, Inc., 543 N.E.2d 382 (Ind. 1989)..... 10
Doran v. Salem Inn, 422 U.S. 922 (1975) 2
Eddy v. McGinnis, 523 N.E.2d 737 (Ind. 1988)..... 10
Erhardt v. State, 468 N.E.2d 224 (Ind. 1984), *rev'g* 463 N.E.2d 1121 (Ind. App. 1984) 9
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)..... 7, 9
FW/PBS, Inc. v. City of Dallas, 493 U.S. ____, 110 S.Ct. 596 (1990) 2
Glen Theatre v. Civil City of South Bend, 695 F.Supp. 414 (N.D. Ind. 1988)..... 4
Jenkins v. Georgia, 418 U.S. 153 (1974)..... 6, 7, 15
Kois v. Wisconsin, 408 U.S. 229 (1972)..... 6, 7
Miller v. California, 413 U.S. 15 (1973)..... 7
Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) *(en banc)*..... 1, 11, 12, 15
Oklahoma City v. Tuttle, 471 U.S. 808 (1985)..... 15
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973). 7
Procunier v. Navarette, 434 U.S. 555 (1978) 15
Schad v. Borough of Mt. Ephraim, 452 U.S. 61 (1981)..... 2, 6-7

Southeastern Promotions v. Conrad, 420 U.S. 546 (1975)..... 7
South Florida Free Beaches v. City of Miami, 734 F.2d 608 (11th Cir. 1984)..... 13
Spence v. Washington, 418 U.S. 405 (1974)..... 5, 7
State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980) 8-14
Sweeney v. State, 486 N.E.2d 651 (Ind. App. 1985) . 13
Texas v. Johnson, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989)..... 5, 7
Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138 (1984), *after remand* 476 U.S. 877 (1986)... 10
United States v. O'Brien, 391 U.S. 367 (1968) 5
Ward v. Rock Against Racism, 491 U.S. ____, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)..... 11, 12, 14

Constitutions, Statutes, and Rules:

U.S. Const., amend. I ..... *passim*
U.S. Sup. Ct. R. 14.1(a) 15
U.S. Sup. Ct. R. 15.1..... 15
Ind. Code §35-45-4-1 ..... *passim*
Ind. Code §35-49-1-5 14
Ind. Code §35-49-2-2 14
Ind. Code §35-49-3-3(2)..... 14
Ind. R. App. P. 15(O)..... 10

Other Authorities:

American Heritage Dictionary of the English Language (1981)..... 3
R. Brustein, "The Avant-Garde and Shock Art," *The New Republic*, Nov. 19, 1990 at 26 3
Webster's New Collegiate Dictionary (1981) 3

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, *et al.*,

Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONERS

I.

The following points reply to the contentions of respondents and *amici* on Question I, whether the barroom-style nude dancing[1] of the respondents is "speech" under the First Amendment.

[1]"Barroom-style nude dancing" encompasses the "go-go" or striptease dancing before the Court in this case; the Seventh Circuit defined the "nude dancing" in this case as "non-obscene nude dancing of the bar-room variety performed as entertainment." *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1082 n. 2 (7th Cir. 1990) *(en banc)* (Pet. App. 3). The Glen Theatre respondents have never alleged or proven that their dancing is significantly different from that presented on the videotape, and their term "performance dance" is overinclusive. (Glen Th. Br. at 6 n. 2.)

A. Prior Decisions of This Court Have Not Held That Nude Barroom-Style Dancing is "Speech" Under the First Amendment.

The respondents and *amici* supporting them rely on prior decisions of this Court as authority for their position that nude barroom-style dancing is protected by the First Amendment.[2] This issue was argued in the Petition for Certiorari (at 8-10) and by *amici* in support of petitioners (Br. *Amicus* of Amer. Fam. Assoc., et al. at 13-14), and the petitioners continue to rely on those discussions for the proposition that those decisions did not decide or intimate a ruling on the issues presented here.

B. The Dancing in This Case is Not "Speech".

With variations on the mantra "inherently expressive," the respondents and *amici* supporting them contend that because dance is a recognized art form which can communicate, it follows that *all* live dance before an audience is "speech" under the First Amendment.[3] But when dealing with a medium that *is conduct* (unlike painting, films, or music), and which is broadly defined to encompass any conceivable body movement which expresses emotion (with or without rhythm, accompaniment, or design), this approach begs the question, and makes First Amendment protection available to every claim that "I was just dancing" ("I was just expressing emotion nonverbally"). The slippery

[2]They cite *California v. LaRue*, 409 U.S. 109 (1972); *Doran v. Salem Inn*, 422 U.S. 922 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981); and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. _____, 110 S.Ct. 596 (1990).

[3]Glen Th. Br. at 13 ("performance dance is inherently 'expressive' "); Miller Br. at 4 ("dance is an established form of meaningful movement whose purpose is by nature communicative"); Br. *Amicus* of ACLU, et al. at 8, 10 ("dance performances have long been an important mode of expressing and communicating a wide variety of ideas and emotions"; "dance performance . . . is expressive by its very nature"); Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 8 ("dance itself is a form of expression").

slope is foretold by the assertion of *amici* that "the most basic human emotions are often best expressed in nonverbal form precisely because they are so basic and thus frequently difficult to verbalize." (Br. *Amicus* of ACLU, et al. at 8.)

It is not possible to legally define "dance" in a way that excludes all conduct, because all conduct expresses emotion. The respondents and *amici* have failed to suggest such a definition. For them, anything that can be called "dance" is "speech", whether performed on the stage of the Kitty Kat Lounge, or by its customers in the aisles, or on the streets of South Bend. Their suggestion of an intermediate level of "speech", made up of forms which are "inherently expressive," is unsatisfactory for the same reason.

That is why the elements of intent, message, perception, and context are crucial in distinguishing "speech" from "nonspeech". An artist or speaker is such because she makes a *conscious* (intentional) effort to create art or to communicate, not because someone might later find unintended artistic value or message in her work.[4] Message, perception, and content lend credence to a claim of artistic or communicative intent.

[4]"Art" has been defined as "the *conscious* use of skill and creative imagination esp. in the production of aesthetic objects." Webster's New Collegiate Dictionary, *s.v.* "art" defn. 4a (1981) (emphasis supplied); or "[t]he *conscious* production or arrangement of sounds, colors, forms, movements, or other elements in a manner that affects the sense of beauty; specifically, the production of the beautiful in a graphic or plastic medium." American Heritage Dictionary of the English Language, *s.v.* "art" defn. 2 (1981) (emphasis supplied).

Post-modern art may be "anti-message" or even "anti-art" (Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 16 n. 2), but it is still intended to affect our sense of the aesthetic. As one critic recently argued, "shock art" is not art when its sole intent is to shock; rather, the great modern artists intend "to explore the boundaries of what is known — which is to say, to experiment with new forms in the hope of extending human consciousness." The result may be shocking, but that does not mean that anything that shocks is art. R. Brustein, "The Avant-Garde and Shock Art," *The New Republic*, Nov. 19, 1990 at 26.

The ability to ascribe *ex post facto* notions of art to mere conduct could not be better illustrated than by respondent Darlene Miller, who until she filed her brief in this Court was "just dancing." *Glen Theatre v. Civil City of South Bend*, 695 F.Supp. 414, 420 (N.D. Ind. 1988) (on remand) (Pet. App. 133). Now she says that her nude dancing is "a dramatization that sensuality is not shameful." (Miller Br. at 10.) If she had credibly asserted an "intent to dramatize" in the district court, Miller might be able to argue now that her conduct was "speech", but she presented no such evidence below, and the district court expressly found no "theatrical or dramatic context." 695 F. Supp. at 419 (Pet. App. 130).

Of course the mere fact that Miller makes money is not conclusive, for artists often intend or hope to benefit financially from their work. Where a dancer's *only* intent is to make money and "entertain", however, her claim that her conduct is "speech" must be rejected.

Respondent Sutro continues to rely on her conclusory and somewhat redundant affidavit ("I . . . have danced nude in an art form I consider to be artistic," J.A. 14), which illustrates the inadequacy of considering only the performer's testimony as to intent and artistic content. More galling is her complaint that the Seventh Circuit dissenters' position is "puzzling given that . . . they did not even see her dance performance." (Glen Th. Br. at 20.) Any deficiency resulting from lack of proof must be held against the party with the burden of proof, and it was Sutro who bore the burden of proving that her dancing was "speech". *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5 (1984).

The mere presence of an audience cannot be a determinative factor,[5] for it would extend First Amendment protection to any spectacle which is curious enough to attract onlookers. *Amici* ACLU, et al. suggest that the presence of an audience distinguishes these dancers from a person strolling nude in a public park. (Br. *Amicus* of ACLU, et al. at 10.) Under this analysis, however, the nude stroller gains First Amendment protection when a crowd gathers, and the professional dancer loses his as the patrons file out. It would also follow that ballroom dancers who do not come within the First Amendment, *City of Dallas v. Stanglin*, 490 U.S. 19 (1989), come within the Amendment when other couples pause to watch them, or even when they watch each other. Audience is an important element of context, including the reason why the audience is present and its understanding of the performance, but its presence cannot be dispositive.

[5]The Miller respondents emphasize that their dancing is "before an audience." (Miller Br. at 3.) *Amici* go further and suggest that "[i]f nothing else, the presence of an audience testifies to the fact of communication." (Br. *Amicus* of ACLU, et al. at 10; see also Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 11.)

C. Nudity Is Not "Speech".

The respondents and *amici*, in arguing that *dance* is speech, contend that "symbolic speech" cases such as *United States v. O'Brien*, 391 U.S. 367 (1968); *Texas v. Johnson*, 491 U.S. ____, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989); and *Spence v. Washington*, 418 U.S. 405 (1974), apply only to "conduct that is not normally expressive" as opposed to activity "that is expressive by its very nature."[6] Even assuming that one can distinguish between "normally expressive" and "normally nonexpressive" conduct, however, it is obvious that *nudity* is not "inherently expressive" but instead is ordinary conduct. Therefore even the respondents and *amici* should agree that the nudity in this case is not "speech" unless it qualifies as communication under *O'Brien*, *Johnson*, and *Spence*.

[6]Br. *Amicus* of ACLU, et al. at 9-10; see Glen Th. Br. at 25 (arguing that *Spence* applies only to activity "which *is* inherently conduct *only*"); Miller Br. at 4 (dance distinguished from "conduct which might from time-to-time have communicative or expressive qualities.").

Their argument instead is that nudity is protected whenever it is "an integral part of the dancers' expression."[7] Acceptance of this argument would amount to a holding that otherwise criminal conduct becomes protected "speech" whenever it is performed in conjunction with some protected form of expression: public sexual intercourse, marijuana use, or other criminal acts would be "speech" under the First Amendment if performed as "an integral part" of, for example, a protected play. The burden would be on the government to justify its criminalization of this protected conduct.

Of course, one respondent assures the Court that dancing could not contain "sex acts, rape, or even murder" — but only because "overriding governmental interests" in prohibiting such conduct would "outweigh any asserted First Amendment right." (Glen Th. Br. at 36 n. 24.) In other words, the criminal acts would be "speech" if done during a dance, but (thank goodness) would be regulable. But where is the line drawn? Apparently not at crimes which are *mala in se*, since public indecency is such a crime (Pet. Br. at 28-29), and other crimes which obviously could not be committed on stage (such as drug use) are *mala prohibita*.

Glen Theatre also suggests that criminal public nudity is protected when combined with dance because "nudity alone" does not remove First Amendment protection from otherwise nonobscene material, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 66 (1981), quoting *Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) (Glen Th. Br. at 23-24, 36 n. 24). The same could be said, however, of depictions of sexual intercourse, which are also protected if not obscene. *Kois v. Wisconsin*, 408 U.S. 229, 231 (1972) (portrayal of sex is not

[7]Glen Th. Br. at 23; see also Br. *Amicus* of Georgia O.P. & Lounge Assoc. at 11 ("nudity itself is central to [dance's] communication"). Respondent Miller, as noted above, has belatedly asserted that her nudity is "a dramatization that sensuality is not shameful" (Miller Br. at 10), an assertion that is simply not credible at this stage of the litigation.

itself sufficient reason to deny First Amendment protection); see *Miller v. California*, 413 U.S. 15, 24 (1973) (to be obscene, work must depict sexual conduct "in a patently offensive way"). Yet this Court has held that such acts do not retain that protection when performed live. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973); *Arcara v. Cloud Books*, 478 U.S. 697, 705 (1986). For the same reason, live "nudity alone" is conduct outside the First Amendment notwithstanding its connection with allegedly protected dance, unless the nudity itself is "speech" under *Johnson* and *Spence*.

The "nudity alone" cases are inapplicable here in any event, because in *Schad*, *supra*, and the cases cited therein the laws at issue attempted to suppress *entire works* on the basis of nudity within them.[8] In this case the statute at issue does not ban entire dance performances, but only nudity within them.

The Miller respondents attempt to distinguish their nudity from on-stage copulation (Miller Br. at 18) on the basis of two false premises. First, their proposed line separating "sensual" dancing from "sexual behavior" is impossible to draw, particularly where dancers admit that their movements are designed to suggest sex. Second, Miller asserts that any "graphic portrayal of sexual activity in an explicit fashion" is obscene (Miller Br. at 19), an assertion that is obviously incorrect in light of *Kois*, *supra*, and *Miller v. California*, *supra*.

None of the respondents has adequately explained why the dancing in this case could not be performed just as effectively without total nudity. In fact, respondent Miller implicitly acknowledges the *de minimis* impact of Indiana's

[8]In *Schad*, the borough banned all "live entertainment." In *Jenkins v. Georgia*, *supra*, an entire film was declared obscene. In *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975), an entire theatrical production was banned. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), entire movies containing nudity could not be aired at drive-ins.

statute when she argues that it is "difficult to believe that the dignity of women is advanced by . . . pasties and a g-string." (Miller Br. at 11). Miller is wrong about the dignity of women; the ultimate act of exposing nipples and genitals is substantially more degrading to a woman. It *is* difficult to believe, however, that the dancers' alleged glorification of the beauty of the human body is deterred in any significant way by merely covering their nipples, genitals, and buttocks.

II.

The following points reply to the contentions of respondents and *amici* on Question II, whether Indiana's public indecency statute may be validly applied to the respondents' nude dancing even if that dancing is found to be First Amendment "speech".

A. The Decision in *State v. Baysinger* Does Not Preclude a Finding That §35-45-4-1 is Valid As Applied.

Our argument on Question II, that Ind. Code §35-45-4-1 is valid as applied even if nude barroom-style dancing is "speech", is challenged by the Glen Theatre respondents as a "non-sequitur" to our position on Question I that the dancing is not "speech". (Glen Th. Br. at 27-28.) That, of course, is the nature of arguments in the alternative. Beyond that, however, they contend that §35-45-4-1 can never be applied to *any* "speech" after *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979), and *Dove v. Indiana*, 449 U.S. 806 (1980). Their theory is that *Baysinger* exempted all "speech" from the operation of the statute, and that *Baysinger* is a binding interpretation of state law. (Glen Th. Br. at 28-30.) They are wrong on both counts.

1. *Baysinger* did not hold that §35-45-4-1 is inapplicable to all "speech". It held that

> public nudity itself, . . . without requiring proof of obscenity, is conduct which *traditionally has been held to be public indecency*, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of *some larger form of expression meriting protection*, when the communication of ideas is involved.

397 N.E.2d at 587 (emphasis supplied).

Thus the *Baysinger* court distinguished between "traditional[] . . . public indecency" and "larger form[s] of expression," not between "nonspeech" and "speech". It found support for this distinction, no doubt, in this Court's earlier suggestion that "public nudity traditionally subject to indecent exposure laws" would not be protected by the First Amendment. *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n. 7 (1975). If *Baysinger* meant to exclude all "speech", the absurd result would be the legalization of public nudity in connection with political protests, or "mooning" with a message.

This interpretation of *Baysinger* is confirmed by the same court's reversal of the Indiana Court of Appeals in *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984), *rev'g* 463 N.E.2d 1121 (Ind. App. 1984) (the "Miss Erotica of Fort Wayne" case). The lower court construed *Baysinger* to have restricted §35-45-4-1 to conduct "which is not primarily expressive in nature and is therefore unprotected by the First Amendment." 463 N.E.2d at 1122. The supreme court reversed, finding Erhardt's nudity to be "conduct squarely within the prohibitions of the statute." 468 N.E.2d at 225. Thus it is clear that *Baysinger* did not exempt from the operation of §35-45-4-1 everything that might be characterized as "expression" or "speech".

2. The so-called "*Baysinger* exception" would not be binding on this Court in any event, because it was clearly based on the Indiana Supreme Court's interpretation of federal law, not state law. While state court interpretations of state statutes are binding on federal courts if based on principles of state law,

> this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying

> interpretation of federal law. In some instances, a state court may construe a state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements.

Three Affiliated Tribes v. Wold Engineering, 467 U.S. 138, 152 (1984), *after remand* 476 U.S. 877 (1986).

Baysinger's narrowing construction of §35-45-4-1 was based solely on the Indiana Supreme Court's concern that such a construction was necessary to avoid overbreadth under the federal constitution.[9] The court found the First Amendment issue to be a "critical part of the final issue to be decided," and noted that toleration of nudity in larger forms of expression may be "constitutionally required." 397 N.E.2d at 587. The narrowing construction of §35-45-4-1 was expressly based on and consistent with the court's established principle that statutes are "cloaked with a presumption of constitutionality" and will be interpreted, when possible, to be valid. *Eddy v. McGinnis*, 523 N.E.2d 737, 738 (Ind. 1988).

B. The Public Indecency Statute is Content-Neutral As Applied and As Written.

1. The so-called "*Baysinger* exception," finding §35-45-4-1 inapplicable to "larger form[s] of expression meriting protection," 397 N.E.2d at 587, did not transform the statute into a content-based restriction.[10] Judge Easterbrook answered this argument in his dissent below:

> A decision saying that a statute does not apply to protected expression recognizes the supremacy of the Constitution over state law; to acknowledge a limit the

[9]It is so clear that *Baysinger* was based on federal law that further clarification is unnecessary. Of course, this case could not be remanded as was *Three Affiliated Tribes*, although if necessary the Indiana Supreme Court can accept a certified question. Ind. R. App. P. 15(O); *Cocalt v. Carey Canada, Inc.*, 543 N.E.2d 382 (Ind. 1989).

[10]The Glen Theatre respondents and *amici* have so argued (Glen Th. Br. at 32-34; Br. *Amicus* of People for Amer. Way, et al. at 21; Br. *Amicus* of ACLU, et al. at 14-15).

> Constitution imposes on legislation is not to abandon the generality of the law. The rules concerning use of the parks in [*Clark v.*] *CCNV* [*supra*] had exceptions too; the Park Service did its best to accommodate expression, allowing the erection of symbolic tent cities, but drew the line at sleeping (which triggered the regulation forbidding "camping"). Government does not forfeit its entitlement to enforce laws regulating conduct by attempting to facilitate the expression of ideas.

Miller (en banc), supra, 904 F.2d at 1121 (Easterbrook, J. dissenting) (Pet. App. 81).

Also analogous are the sound control guidelines in *Ward v. Rock Against Racism*, 491 U.S. ____, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), in which the event sponsors claimed that the city was "seeking to assert artistic control over performers at the Bandshell by enforcing a bureaucratically determined, value-laden conception of good sound." 109 S.Ct. at 2754. The Court rejected that claim, finding that "the city's concern with sound quality extends only to the clearly content-neutral goals of ensuring adequate sound amplification and avoiding the volume problems associated with inadequate sound mix." *Id.*

The "content-neutral goals" in this case, as previously argued, are deterrence of prostitution, sexual assaults, criminal activity, degradation of women, and other activities which break down family structure. Yes, the distinction drawn in *Baysinger* affects nude barroom and "bookstore" dancers differently from nude dancers in theatrical productions, but "[a] regulation that serves purposes unrelated to the content of expression is deemed neutral, *even if it has an incidental effect on some speakers or messages but not others.*" *Ward, supra*, 109 S.Ct. at 2754 (emphasis supplied). It does not take much insight to recognize that the "secondary effects" of nude dancing are more likely to be prevalent at places like the Kitty Kat Lounge or the Chippewa Bookstore than at a production of *Ballet Africains*, regardless of the message or content of each performance. See *City of Renton v. Playtime Theatres*, 475

U.S. 41, 47-50 (1986). It seems obvious, for example, that productions of *Salome* or even *Hair* would be unlikely to inspire patrons to solicit sex from performers or contemplate rape or adultery, or would degrade women, in the same way that would bartop or booth nude dancing. A State's attempt to narrowly tailor its restrictions in response to perceived First Amendment problems should not be discouraged by the automatic application of "strict scrutiny" to every such attempt.

2. If the respondents and *amici* truly want a statute that is content-neutral as they would define that concept, they can have one. It would be easy enough to set aside the "*Baysinger* exception" by legislation or on the ground that it was based on misperceptions of what the First Amendment requires, and take §35-45-4-1 as written.[11] The statute would then apply equally to the Kitty Kat Lounge, the Chippewa Bookstore, the *Ballet Africains*, and *Salome* — it would be utterly content-neutral.

The statute would still be defensible as a reasonable, narrowly tailored "manner" restriction, as were the volume restrictions in *Ward*, *supra* (loudness is to rock music as nudity is to dance). It would also continue to apply only to *live* conduct, not depictions of conduct in books, films, or videotapes.[12]

[11] *Baysinger* is arguably irrelevant on two grounds: (1) it found nude barroom-style dancing to be nonspeech (Question II assumes *arguendo* that the dancing is "speech"); and (2) it did not consider the possibility that §35-45-4-1 is valid as applied to *all* conduct as a reasonable "manner" restriction, possibly because many of the cases clarifying this defense were decided after 1979.

[12] The statute could not be construed to apply to anything but live conduct. Any impression to the contrary from comments of the petitioners' counsel at oral argument below was erroneously given. See *Miller (en banc)*, *supra*, 904 F.2d at 1103-1104 (Pet. App. 45-46) (Posner, J. concurring).

Such a statute would not be "hopelessly overbroad" (Glen Th. Br. at 31), for the statute would not deter entire performances, only nudity within them. A facial overbreadth claim would fail for three reasons: (1) An overbreadth claim is inappropriate because the interests of these dancers would be no different than those of third parties not before the Court. *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 796-803 (1984). (2) The range of allegedly protected "speech" potentially affected by §35-45-4-1 is quite small when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). Nude dancing in theaters and bars represents only a small fraction of public nudity which even the respondents appear to concede is properly proscribable. (3) The exaggerated examples given by Glen Theatre (Br. 30-31 n. 19) do not show overbreadth. Thong bikinis might be criminal under §35-45-4-1, but wearing them on beaches is not protected by the First Amendment. See *South Florida Free Beaches v. City of Miami*, 734 F.2d 608 (11th Cir. 1984). Closed art classes and Y.M.C.A. showers are probably not "public places,"[13] and showering is not protected by the First Amendment either. Possible disputes over the definition of "discernibly turgid" relate to vagueness, not overbreadth, and have never been raised by the female plaintiffs in this case.

The petitioners have not defended §35-45-4-1 as applied even to ballet and theater productions, because the statute is content-neutral even with the "*Baysinger* exception." In the final analysis, it is doubtful that the respondents and *amici* would actually prefer a statute made "content-neutral" by elimination of the "*Baysinger* exception."

[13] *Baysinger's* definition of "public place" is limited to places freely open and accessible to the public by express or implied invitation. 397 N.E.2d at 582-583. Thus, for example, an enclosed booth in which a single patron closes the door behind him to view a nude performer is not a "public place," because the public at large is excluded from the booth. *Sweeney v. State*, 486 N.E.2d 651 (Ind. App. 1985). Arguably, an art class open only to registered students is also not a "public place" because the public at large is excluded.

C. The Public Indecency Statute is a Reasonable "Manner" Restriction on Erotic Dancing.

The arguments of the respondents and *amici* on this point are answered for the most part in the petitioners' opening brief on the merits. It should be emphasized that § 35-45-4-1 does not ban entire performances, but only requires that the dancers wear minimal covering while performing. Nudity is a "manner" of dancing just as loudness is a "manner" of performing music, see *Ward*, *supra*, although many rock musicians would complain that their music is not as effective when played less loudly.

One erroneous point requires correction: the Glen Theatre respondents assert that under *Baysinger*, *supra*, a protected theatrical performance could be displayed in open places "such as a street corner" where minors could view the nudity therein. (Glen Th. Br. at 38.) Such a performance, however, would be illegal under Indiana's laws which forbid the knowing display of nudity to minors. Ind. Code §§ 35-49-1-5, 35-49-2-2, 35-49-3-3(2).

D. The Issue of Whether Nudity in Erotic Dancing May Be Regulated is Properly Before This Court.

In a footnote, the Glen Theatre respondents contend that the petitioners waived their argument that §35-45-4-1 is a valid regulation of "speech" (Question II) by failing to make the argument in the lower courts. (Glen Th. Br. at 27 n. 16.) Regardless of how the case was argued below, however, Question II is properly before this Court and should be decided on the merits for three reasons.

1. The respondents did not mention this alleged waiver in their brief in opposition to the petition for certiorari in this case. "Nonjurisdictional defects of this sort should be brought to [the Court's] attention *no later* than in respondent's brief in opposition to the petition for certiorari; if not, we consider it within our discretion to deem the defect waived." *City of Canton v. Harris*, 489 U.S. 378, 384-385 (1989), quoting *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985). This practice has now been incorporated into the Rules of this Court. U.S. Sup. Ct. R. 15.1.

2. The Seventh Circuit expressly decided Question II on the merits. The majority opinion, without even suggesting waiver, concluded after finding nude dancing to be "speech" that "we must next examine whether the Indiana statute is a valid restriction on that protected expression." *Miller (en banc)*, *supra*, 904 F.2d at 1088 (Pet. App. 14).[14] Only one member of the majority, who concurred in both the majority opinion and judgment of the court, suggested waiver after also rejecting the regulation argument on the merits. 904 F.2d at 1089, 1103 (Posner, J. concurring). This Court has consistently found that a constitutional issue passed upon by the court below should be decided regardless of how the issue was argued or raised by the parties. *City of Canton v. Harris*, *supra*; *Jenkins v. Georgia*, *supra*, 418 U.S. at 157.

3. The validity of the regulation of "speech" is fairly included in the First Amendment question raised in this case by the respondents when they filed suit and appealed from the district court. Indeed, the majority below concluded that it had no choice but to address the issue. 904 F.2d at 1088 (Pet. App. 14) ("Our inquiry cannot end here. . . . [W]e must next examine whether the Indiana statute is a valid restriction. . . ."). This case cannot be satisfactorily decided without full consideration of the validity issue. The Seventh Circuit recognized this, and this Court's practice of addressing "fairly included" issues confirms the need to decide the issue in this case. See U.S. Sup. Ct. R. 14.1(a); *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 94 n. 9 (1982); *Procunier v. Navarette*, 434 U.S. 555, 559 n. 6 (1978).

---

[14] The assertion that the Seventh Circuit "follow[ed] its own precedent in declining to substantively address these issues" is therefore patently incorrect. (Glen Th. Br. at 27 n. 16.)

CONCLUSION

The judgment of the Seventh Circuit should be reversed, and the judgment of the district court in favor of the petitioners (defendants below) should be affirmed.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

WAYNE E. UHL
Deputy Attorney General
(Counsel of Record)

219 State House
Indianapolis, IN 46204
(317) 232-6333

Counsel for Petitioners

January 4, 1991

Supreme Court, U.S.
FILED
NOV. 15
JOSEPH F. SPANIOL, JR.
CLERK

(8)

No. 90-26

IN THE

SUPREME COURT OF THE UNITED STATES

October Term , 1990

MICHAEL BARNES, PROSECUTING ATTORNEY OF ST. JOSEPH COUNTY, INDIANA; LINLEY E. PEARSON, ATTORNEY GENERAL OF INDIANA; CIVIL CITY OF SOUTH BEND; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

V.

GLEN THEATRE, INC. et al. and DARLENE MILLER, et al.,

Respondents

BRIEF OF AMERICAN FAMILY ASSOCIATION, INC., NATIONAL FAMILY LEGAL FOUNDATION, INC., CHILDREN'S LEGAL FOUNDATION, INC., ELENA BOWMAN, LOU ANN HILL, SALLY BEARD, AND BRENDA GILL, AMICI CURIAE, IN SUPPORT OF PETITIONERS

Peggy M. Coleman
Counsel of Record
Benjamin W. Bull
Nikolas T. Nikas
American Family Association, Inc
Post Office Drawer 2440
Tupelo, Mississippi 38803
(601) 844-5036

Alan E. Sears
National Family Legal Foundation, Inc.
3030 North Third Street, Suite 200
Phoenix, Arizona 85012
(602) 241-8520

James Mueller
Children's Legal Foundation, Inc.
2845 East Camelback Raod, Suite 740
Phoenix, Arizona 85016

November 14, 1990

TABLE OF CONTENTS

Page

Table of Authorities ii

Interest of Amici Curiae 1

Summary of Argument 4

Argument

I. Nude Dancing Is Not An Activity That Is Protected As Speech Within The Meaning of The First Amendment 5

A. Public Nudity Is Conduct Clearly Outside the Bounds of Consideration for First Amendment "Speech" Protection 5

B. The Activity Constituting "Nude Dancing" Does Not Contain Any of the Elements of Historically Recognized Dance That Would Entitle It To Constitutional Protection 8

C. The Combination of Nudity With Movement In a Barroom Setting Is Not Speech Entitled to Protection Under the First Amendment ... 12

D. The Previous Decisions By This Court Addressing the Subject of Nude Dancing Have Not Granted It Constitutional Protection 13

II. Any Speech Aspects That Are Associated With Nude Dancing Are Commercial in Nature Only ..15

III. Conclusion 18

TABLE OF AUTHORITIES

Cases

Page

Banzhaf v Federal Communications Commission, 405 F.2d 1082 (D.C. App. 1968) *cert. denied*, 396 U.S. 842 (1969) . . . 15

Bigelow v Virginia, 421 U.S. 809 (1975) 15, 16

Breard v City of Alexandria, 341 U.S. 622 (1951) 15

Capital Broadcasting Company v Mitchell, 33 F.Supp. 582 (D.D.C. 1971) 15

California v LaRue, 409 U.S. 109 (1972) 13, 14

Chapin v Town of Southampton, 457 F.Supp. 1170 (E.D. N.Y. 1978) 6

Craft v Hodel, 683 F.Supp. 289 (D. Mass. 1988) 5

Crownover v Musick, 9 Cal. 3d 405, 509 P.2d 497, 107 Cal. Rptr. 681 (1973) 11

Dallas v Stanglin, 490 U.S. ____, 104 L.Ed. 2d 18 (1989) 9

Doran v Salem Inn, 422 U.S. 922 (1974) 14

Jacobellis v Ohio, 378 U.S. 184 (1964) 13

Miller v California, 413 U.S. 15 (1973) 13

Miller v Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990) 8, 10, 12

Murdock v Com. of Pennsylvania, 319 U.S. 105 (1943) 15

Naturists Society, Inc. v Fillyaw, 736 F.Supp. 1103 (S.D. Fla. 1990) 6, 11

Paris Adult Theatre I v Slaton, 413 U.S. 49 (1973) 13

Schad v Mt. Ephraim, 452 U.S. 61 (1981) 14

South Florida Free Beaches v City of Miami, 548 F.Supp. 53 (S.D. Fla. 1982) 5

South Florida Free Beaches v City of Miami, 734 F.2d 608 (11th Cir. 1984) 6

Spence v Washington, 418 U.S. 405 (1974) 10, 11

Valentine v Chrestensen, 316 U.S. 52 (1942) 15

Virginia Pharmacy Board v Virginia Consumer Council, 425 U.S. 748 (1976) 16

Statutes and other material

ALA CODE sec. 13A-12-130 (1990) 6

ALASKA CODE sec. 11.41.460 (1989) 6

ARIZ. REV. STAT. ANN. sec. 13-1402 (1989) 6

ARK. STAT. ANN. sec. 5-14-112 (1990) 6

CAL. PENAL CODE sec. 314 (1990) 6

COLO. REV. STAT. sec. 18-7-301 (1990) 6

CONN. GEN. STAT. ANN. sec. 53a-186 (1990) 6

DEL. CODE ANN. tit. 11, sec. 1340 (1990) 6

FLA. STAT. ANN. sec. 800.03 (1990) 6

GA. CODE ANN. sec. 16-6-8 (1990) 6

ILL. REV. STAT. ch. 38 sec. 11-9 (1990) 6, 7

IOWA CODE ANN. sec. 728.5 (1990) 6

KY. REV. STAT. sec. 570.150 (1990) 6

ME. REV. STAT. ANN. sec. 851 (1990) 6

MD. CRM. LAW CODE ANN. sec. 335A (1990) 6

MICH. COMP. LAWS ANN. sec. 750.335a (1990) 6

MINN. STAT. ANN. sec. 617.23 (1990) 6

MONT. CODE ANN. sec. 45-5-5-4 (1989) 6

NEB. REV. STAT. sec. 28-806 (1990) 6

N.H. REV. STAT. ANN. sec. 645.3 (1990) 6

N.M. STAT. ANN. sec. 30-9-14 (1990) 6

N.C. GEN. STAT. sec. 14-190.9 (1990) 6

OHIO REV. CODE ANN. sec. 2907.09 (Page 1990) 7

OR. REV. STAT. sec. 163.465 (1990) 7

PA. STAT. ANN. titl. 18 sec. 5901 (Purdon 1990) 7

S.D. COMP. LAWS ANN. sec. 22-24-1 (1990) 7

TENN. CODE ANN. sec. 39-13-511 (1990) 7

VA. CODE sec. 18.2-387 (1990) 7

WASH. REV. CODE ANN. sec. 9A.88.010 (1990) 7

W.VA. CODE sec. 61-8B-10 (1990) 7

WYO. STAT. sec. 6-4-2-1 (1990) 7

UPI, (March 10, 1988) 7

INTEREST OF AMICI CURIAE

Consent of the Parties

American Family Association, Inc. (AFA); National Family Legal Foundation, Inc. (NFLF); Children's Legal Foundation, Inc. (CLF); Ms. Elena Bowman, Vice-President, St. Joseph County Commission on the Status of Women; Ms. Lou Ann Hill, Secretary, St. Joseph County Commission on the Status of Women; Ms. Sally Beard, Treasurer, St. Joseph County Commission on the Status of Women; and Brenda Gill, have received consent of the parties to the filing of this Brief Amici Curiae.[1]

American Family Association, Inc.'s Interest

AFA is a nonprofit organization incorporated in 1977 under its original name of National Federation for Decency, Inc. AFA operates as a leader of citizen and church participation to promote traditional American values and apply the Biblical ethic in society. AFA has supporters in all 50 states; has over 600 chapters of local citizens who are active in seeking to preserve community integrity through the implementation of public decency laws and has over 420,000 individuals and churches who are subscribers to its monthly newsletter, AFA Journal.

AFA is consistently asked by local governments and law enforcement officers for advice and guidance on methods of regulating nude dancing establishments. AFA chapters actively seek to preserve the integrity of their local communities through the regulation of such businesses. The effective use of public decency statutes to preserve traditional values is a method which is used by local chapters in this effort.

The ability of AFA to continue to call for the enforcement of such laws is contingent upon a finding that a state may impose sanctions upon individuals appearing nude in public in this

[1] Counsel of record to the parties in this case have consented to the filing of this brief and letters of consent have been filed with the Clerk pursuant to Rule 36.

manner. AFA and the citizens that it represents, would be severely harmed if the decision of the United States Court of Appeals for the Seventh Circuit was permitted to stand.

Interest of Elena Bowman's, Lou Ann Hill's and Sally Beard's Interest

Ms. Elena Bowman, Vice-President; Ms. Lou Ann Hill, Secretary; and Ms. Sally Beard, Treasurer; are members and officers of the St. Joseph County Commission on the Status of Women. They are participating in their individual capacities and as citizens and residents of St. Joseph County, Indiana. Each has advocated a position and worked to promote an enhanced quality of life for women in St. Joseph County. Through these efforts each has sought the enforcement of public decency laws in St. Joseph County.

The efforts they have engaged in will be severely impaired if the ruling of the Seventh Circuit is permitted to stand.

National Family Legal Foundation, Inc.'s Interest

NFLF is a nonprofit organization that was created in 1990 under the laws of the state of Arizona to address the enforcement of obscenity and public decency laws throughout the country. Its stated purposes are to reduce the harms of pornography to the general public; to assist law enforcement officers and other elected officials implement pornography-related laws; and to protect the innocence, physical and mental safety of children in the United States.

The efforts that NFLF has begun will be seriously affected if the ruling of the Seventh Circuit is permitted to stand.

Children's Legal Foundation, Inc.'s Interest

CLF was formed in 1957 as Citizens for Decent Literature, Inc., later renamed Citizens for Decency through Law, Inc., to provide a means for lawyers to assist prosecutors and police in enforcing and defending obscenity laws, to assist public officials improve and adopt constitutional statutes and ordinances, and to assist local citizens and community leaders understand the role of the law and legal system in dealing with the social issue of pornography and sexual exploitation.

CLF has affiliated chapters, all across the country, of independent citizens who wish to share in the experience of its staff. Such chapters and other citizen groups maintain their own structure and local objectives, but are advised by CLF of the legal precedent in their home states and other jurisdictions. CLF maintains that the law can deal effectively with criminal abuses of prostitution, live sexual commercialization and obscenity.

The efforts of CLF will be greatly impaired if the decision of the Seventh Circuit is permitted to stand.

Brenda Gill

Ms. Brenda Gill is a resident and citizen of St. Joseph County, Indiana, and has been victimized by the use of sexually explicit materials. Since the time of her victimization she has taken a public stand advocating the enforcement of pornography-related laws and has called for protection of women who are exploited in the sex industry.

Indiana has sought to protect its citizens and their community environments through the prohibition against public nudity. Consequently, all *Amici* will support the position of the Attorney General of the State of Indiana regarding the constitutional application of public decency laws to nude dancing.

SUMMARY OF ARGUMENT

This Court has traditionally afforded nude dancing few first amendment protections. The Seventh Circuit has disregarded these precedents and has extended prior Supreme Court case law beyond the bounds of the logical implications of those decisions.

The type of barroom nude movement that is found in the Kitty Kat Lounge and other similar establishments is not the type of conduct that is entitled to the protection of the first amendment. In addition, any speech elements that are attendant to the nude dancing are purely commercial in nature and are afforded minimal constitutional protection.

The Seventh Circuit's decision would elevate nude dancing to a place that few activities within the State of Indiana enjoy. It would, in many circumstances, place nude dancing beyond the legitimate control of the State.

LAW AND ARGUMENT

I. NUDE DANCING IS NOT AN ACTIVITY THAT IS PROTECTED AS SPEECH WITHIN THE MEANING OF THE FIRST AMENDMENT

A. Public Nudity is Conduct Clearly Outside the Bounds of Consideration of First Amendment "Speech" Protection

> Over thirty years ago, Justice Douglas predicted "[n]o one would suggest that the First Amendment permits nudity in public places." Roth v United States, 354 U.S. 476, 512, 77 S.Ct. 1304, 1323, 1 L.Ed. 2d 1498 (1957) (Douglas, J., dissenting). This case presents the precise question Justice Douglas regarded as beyond suggestion: Whether, and if so, where, when and how the Constitution compels the government to allow nudity in public.

Craft v Hodel, 683 F.Supp. 289, 290 (D. Mass. 1988).

Recently, there have been repeated attempts to draw public nudity within the confines of constitutional protection. Many of these attempts have come from nudists and the organizations they support. Nudists consistently maintain that their nudity is expressive and thus should be afforded protection under the first amendment. The several courts that have addressed the question of nudity as expression have all concluded that public nudity is conduct and is not protected by the first amendment. "All these cases indicate that mere nudity, while not obscene, is also not expressive in the sense that nudity might be in a play or work of art." *South Florida Free Beaches v City of Miami*, 548 F.Supp. 53 (S.D. Fla. 1982). "Although nudity is not in itself obscene, Erznoznik, 422 U.S. 205, 213, 95 S.Ct.

2268, 45 L.Ed. 2d 125 (1975), neither is it communicative." *Chapin v Town of Southampton*, 457 F.Supp. 1170 (E.D. N.Y. 1978). Even the activity of nude sunbathing engaged in by individuals subscribing to the tenets of nudism has been found to lack constitutional protection. *South Florida Free Beaches v City of Miami*, 734 F.2d 608 (11th Cir. 1984).

In *Naturist Society, Inc. v Fillyaw*, 736 F.Supp. 1103, 1111 (S.D. Fla. 1990), the court rejected the contention that nudity by the nudists was expression entitled to first amendment protection and stated, "Even if plaintiffs intend to advocate a clothing option al lifestyle by appearing on the beach in G-strings, pasties, and socks, the court finds, as a matter of law, that there is not a *great* likelihood that other beach patrons would understand this message. Indeed, because of the *de minimis* amount of clothing to be worn, the court is hard pressed to find any expression at stake other than promotion of the nude body."

Nudity is conduct and is not entitled to first amendment protection because "nudity alone conveys no specific content to whatever message is communicated." *Craft* , 683 F.Supp. at 292. The courts have recognized that only when nudity is accompanied by "some mode of expression which itself is entitled to first amendment protection." is it afforded any constitutional protection. *Chapin* , 457 F.Supp. at 1174.

The majority of states have joined Indiana in prohibiting the conduct of appearing nude in public.[2] In fact some states

[2] *See*, ALA CODE sec. 13A-12-130 (1990); ALASKA STAT. sec. 11.41.460 (1989); ARIZ. REV. STAT. ANN. sec. 13-1402 (1989); ARK. STAT. ANN. sec. 5-14-112 (1990); CAL. PENAL CODE sec. 314 (1990); COLO. REV. STAT. sec. 18-7-301 (1990); CONN. GEN. STAT. ANN.sec. 53a-186 (1990); DEL CODE ANN. tit. 11, sec. 1340 (1990); FLA. STAT. ANN. sec. 800.03 (1990); GA. CODE ANN. sec. 16-6-8 (1990); ILL. REV. STAT. ch. 38 sec. 11-9 (1990); IOWA CODE ANN. sec. 728.5 (1990); KY. REV. STAT. sec. 570.150 (1990); ME. REV. STAT. ANN. sec. 851 (1990); MD. CRM. LAW CODE ANN. sec. 335A (1989); MICH. COMP. LAWS ANN. sec. 750.335a (1990); MINN. STAT. ANN. sec. 617.23 (1990); MONT. CODE ANN. sec. 45-5-5-4 (1989); NEB. REV. STAT. sec. 28-806 (1990); N.H. REV. STAT. ANN. sec. 645.3 (1990); N.M. STAT. ANN. sec. 30-9-14 (1990); N.C. GEN. STAT. sec. 14-190.9 (1990); OHIO REV. CODE

have expressly recognized the history of the regulation of public nudity.[3] The conduct of public nudity has not and does not currently enjoy constitutional protection anymore than any other conduct an individual may engage in.

It is also important to understand the full import of the "nude dancing" establishments. Such businesses, particularly those that do not sell alcoholic beverages on site are growing in number across the country with their sole purpose being to avoid State alcohol beverage control laws. The types of activities and the dangers associated with the business are still present since patrons consume alcohol that has been purchased elsewhere.[4] The application of public decency laws to the performers is a reasonable and necessary method to address these attempts to thwart the law.

ANN. sec. 2907.09 (Page 1990); OR. REV. STAT. sec. 163.465 (1990); PA. STAT. ANN. tit. 18 sec. 5901 (Purdon 1990); S.D. COMP. LAWS ANN. sec. 22-24-1 (1990); TENN. CODE ANN. sec. 39-13-511 (1990); VA. CODE sec. 18.2-387 (1990); WASH. REV. CODE ANN. sec. 9A.88.010 (1990); W.VA. CODE sec. 61-8B-10 (1990); WYO. STAT. sec. 6-4-2-1 (1990).

[3] In the Legislative Commentary accompanying the text of the statute in Illinois outlined the historical context of public indecency laws.

> Since Sir Charles Sidley in 1663 reeled drunkenly onto his balcony to expose his nude body ton assemblage in Covent Garden below, the common law has recognized indecent exposure as a public nuisance and a misdemeanor. (LeRoy v Sidley, 82 Eng. Reprint 1036 (1663)). Because the offense developed as a "public nuisance" , the nice distinction of the common law evolved around the publicity attaching to the event. (Rex v Drumden, 170 Eng. Reprint 1091 (1809) — exposure of nude body incident to disrobing for bathing at a beach within public view held to constitute a nuisance.
>
> ILL. REV. STAT. ch. 38, sec. 11-9.

[4] Rep. Bobby Raymond, D-Phoenix, said he sponsored the bill [aimed at closing down night clubs that allow customers to bring their own liquor as they watch nude dancers] after receiving complaints about the Great Alaskan Bush Company, which is in his district. Raymond said the Bush Company and several similar nightspots in west Phoenix have created, 'a dangerous situation' by taking advantage of a loophole in the law." UPI (Mar. 10, 1988).

B. The Activity Constituting "Nude Dancing" Does Not Contain Any of the Elements of Historically Recognized Dance That Would Entitle It to Constitutional Protection

The Seventh Circuit in *Miller v Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990), went to great lengths to extol the virtues of nude dancing in terms of the dance artform that it represents. The court began by noting that "dance has bee defined as the *art* of moving the body in a rhythmically way, usually to music, to express an emotion or idea, to narrate a story, or simply to take delight in the movement itself." 904 F.2d at 1085 (emphasis added). The court went on to state, "nude barroom dancing, though lacking in *artistic* value, and expressing ideas and emotions different from those of more mainstream dances, communicates them, to some degree, nonetheless." 904 F.2d 1087 (emphasis added). The court initially uses the definition of dance as an "art" form and after analysis of the subject presentation concludes that it lacks "artistic" value. If some artistic merit is an inherent element of dance, then the presentations at the Kitty Kat Lounge are something other than dance since they lack such artistic quality.

The dance that has impliedly received first amendment protection had a measure of artistic quality that is lacking in the barroom movement found in the Kitty Kat Lounge. The activity is nothing more than a woman who is paid to disrobe in a public establishment while music is being played in the background. There is no storyline or artistic form. The dancers are not attempting to make any kind of emotional or political statement. At best, the performers are attempting to titillate or arouse the patrons.

The video tape recording of the two dancers depicts each dancer performing to two songs. The first dancer is on a runway, fully clothed, with the song, "Matter of Trust", recorded by Billy Joel, playing in the background. During the course of the song, the performer raises her skirt to reveal string bikini underwear.

She remains fully clothed during the playing of the entire song. During the second song, "You Give Love a Bad Name", by Bon Jovi, she removes her dress. She continually moves about on the runway during the playing of the song. The second performer depicted on the video tape recording also appears fully clothed throughout the first song, "Count Your Blessings", by Dionne Warwick. Toward the end of the song she removes her dress and continues the performance clad in a one-piece swimsuit. During the playing of the second song, a recording by the Bee Gees, the performer removes her swimsuit. She continues the movement with the music in the background until the song is complete. There is no discernible choreography to illustrate either the mood, music or lyrics of the songs.

This should be contrasted with the suggested comparable ballet pieces that are solely constituted and created for the purpose of interpreting a musical score of illustrating a specified emotion. It is the artistic quality that places dance in a protected category and separates it from other movement that is not entitled to first amendment protection. The artistic quality referenced in these works is synonymous with communicative expression of discernible thought. The absence of such a quality results in nothing more than random movement for hire and patronization of the voyeuristic interests of the customers.

This Court recently addressed the argument that dance as expressive conduct or speech should be afforded constitutional protection. In *Dallas v Stanglin* , 490 U.S. _____, 104 L.Ed. 2d 18, 25-26 (1989), this Court stated that, "It is possible to find some kernel of expression in almost every activity a person undertakes—for example, walking down the street, or meeting one's friends at a shopping mall—but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." It is obvious and settled within the law that the conduct alleged to be expressive must be something more than mere random movement.

The proper analysis of conduct as a communicative activity was outlined in *Spence v Washington*, 418 U.S. 405,

410-11 (1974). The Court stated that in order to enjoy first amendment protection the actor must intend "to convey a particularized message... and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it." The message must be something beyond the mere exploitation or advertisement of the performer's nude body. Consequently, it is this two-part analysis that must be applied to the activity of nude dancing in determining whether it is a communicative activity.

The first part of the analysis requires a determination of whether the actor "intended to convey a particularized message." In response to this inquiry the Seventh Circuit found, contrary to the conclusions of the district court, that the "dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality." 904 F.2d at 1086-87. There is nothing in the record that would support a finding that the dancers either individually or collectively intended to convey "a particularized message."

The dancers, as shown in the video tape accompanying the record in this case, conduct their movements to prerecorded popular music and remove their clothing after a period of time. There is no apparent theme from their movement except an attempt to appeal to the prurient and voyeuristic interests of the patrons.

In a concurring opinion, Judge Posner, suggests that it is the music that forms the basis for the protection afforded nude dancing. *Miller*, 904 F.2d at 1096. The music, however, to which the women move are songs by Billy Joel, Bon Jovi, Dionne Warwick and The Bee Gees. There has been no suggestion found in the record that the messages contained in the lyrics or music of the songs were used to convey a particular message evoked by the performers. The basis for using the songs were used to convey a particular message evoked by the performers. The basis for using the songs appears to be nothing more than, in the terms of American Bandstand participants, "it had a good beat and was easy to dance to."

The movement accompanying the songs did nothing to complement or personify the lyrics or music of the material. The songs did nothing more than provide rhythmic noise within which the women could move and accomplish their purpose of disrobing for the leering looks and the voyeuristic interests of the patrons.

The movement is not even a classic "striptease" in the sense that the audience is tantalized through the seduction of the actor as she removes her clothing slowly. The removal of the clothing is relative abrupt and does not follow any particular suggestion or movement by the actor.

A reasonable viewing of the performances leaves one "hard pressed to find any expression at stake other than promotion of the nude body." *Fillyaw*, 736 F.Supp. at 1111.

The court in *Crownover v Musick*, 9 Cal. 3d 405, 425-26, 509 P.2d 497, 107 Cal. Rptr. 681 (1973), described the essence and context of nude dancing when it stated, "Unless we wish to blind ourselves to what is happening in big cities with their 'topless' and 'bottomless' bars and 'nude live acts' in a tawdry atmosphere that blights the neighborhood if not the entire community, it is common knowledge that such conduct is nothing more than a sales gimmick. It is delusive to speculate in the face of these realities that the entertainment in this milieu will acquire protectable communicative properties by exposure of the genitals, pubic area or female breasts of the performers." The objective of the dancers is to entice the patrons to purchase beverages or food from the Lounge and in many instances to entice the patrons to engage in acts of prostitution outside the confines of the business establishment.

The second level of analysis requires a determination of whether there is "a great likelihood that the message would be understood by those perceiving it." *Spence*, 418 U.S. at 411. As the opinions of the district court and that of the various judges of the Seventh Circuit reveal, there is no consistent understanding of the message the actors were attempting to convey. The fact that individuals pay to view the dances, contrary to the belief of

the Seventh Circuit, does not lend support for the conclusion that the viewer understands the expression underlying the movement. *See, Miller*, 904 F.2d at 1087.

This premise is clearly false for two reasons. First, as a practical matter, since the money is paid in advance by the customer, he is obviously not paying for the message that he has received from the performance that he witnessed thereafter. Secondly, the patron of a "nude dancing" establishment is present and has paid money purely to witness lewd or sexually provocative presentations. A patron of a "nude dancing" establishment is drawn to and held by the performances out of a sense of curiosity and prurient interest. It would be ludicrous to suggest that the patron of a Dance of Seven Veils or Les Ballets Africains de Keita Fodeba is drawn to them for the same reason that a man goes to watch the activity at a "nude dancing" establishment.

The activity combines two distinct elements. The first is nudity. Women appear naked simply for the sake of the nudity itself. The second is movement under the guise of dance. Women are paid money to appear on a public platform and remove their clothing in a seductive, erotic or provocative manner. The movement does not involve any specific choreography and does not involve any plot other than to result in the nudity of the actor and in the arousal of the males in the audience. This movement no more involves expression than does the movement by the proverbial "dirty old man" in the park opening his trench coat to expose himself to passersby.

C. The Combination of Nudity With Movement in a Barroom Setting Is Not Speech Entitled to Protection Under the First Amendment

Since nudity is not communicative, then in the analysis of nude dancing as speech within the first amendment, requires that the dance be protected form of speech. As stated previously, the movement that accompanies the music and provides the

means by which the women finally appear nude is not dance as that term has been historically understood.

In fact, this Court has discussed certain distinctions in the forms of communication that would serve to support the State's inherent ability to prohibit nude barroom dancing under the public indecency statute. In *Miller v California*, 413 U.S. 15, 26 n.8 (1973), the Court stated that "States have a greater power to regulate nonverbal, physical conduct than to suppress oral or written descriptions or depictions of the same behavior." While this conduct may be permitted to be distributed in, nonobscene, recorded form, the fact that it is a live performance renders it more susceptible to state regulation. In addition, this Court in *Paris Adult Theatre I v Slaton*, 413 U.S. 49, 60 (1973), *citing*, *Jacobellis v Ohio*, 378 U.S. 184, 199 (1964) (Warren C.J., dissenting) stated, "there is a 'right of the Nation of the States to maintain a decent society . . . .,'."

These limitations serve to place the activities of the women performing at the Kitty Kat Lounge in a more restrictive light than had they merely been presented on film at the local theater. The ability to limit the activities are based both on the State's right to maintain a decent society and its right to treat live nude performances differently than it does those that are presented by way of film.

D. The Previous Decisions By This Court Addressing the Subject of Nude Dancing Have Not Granted It Constitutional Protection

The Supreme Court decisions relied upon by the Seventh Circuit for the proposition that when nudity and movement are combined that the activity suddenly becomes cloaked in first amendment protection have been misapplied.

In *California v LaRue*, 409 U.S. 109 (1972), the Court found that the regulation of nude dancing in establishments that served alcohol was within the powers of state granted under the twenty-first amendment. In *LaRue*, the Court found that "some

of the performances to which these regulations address themselves are within the limits of constitutional protection." 409 U.S. at 118. This Court did not, however, elaborate or give examples of the type of dances that would fall within the protected category.

In *Doran v Salem Inn*, 422 U.S. 922 (1974), the Court was faced with the regulation of "topless" dancing establishments. The Court upheld the granting of the preliminary injunction based upon its statements in *LaRue* that "this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." 422 U.S. at 932.

The third case, *Schad v Mt. Ephraim*, 452 U.S. 61 (1981), involved a facial challenge to a zoning ordinance that prohibited all "live entertainment." The Court found that the regulation was not supported by any evidence of incompatibility with surrounding uses or problems with parking or trash associated with the business. The Court again stated that "Nude dancing is not without its First Amendment protections from official regulations." 452 U.S. at 66.

While the Seventh Circuit relies on these cases to support its conclusion that the State is without power to prohibit public nudity in the form of barroom dancing, a contrary conclusion is more reasonable. In fact, these three cases are wholly consistent with more recent decision, cited previously, addressing the issue of communicative expression.

The Court was fully aware of its decisions concerning communicative expression as protected speech. *See, Spence v Washington*, 418 U.S. 405 (1974). With this awareness the Court consistently has held that *some* types of nude dancing would be afforded constitutional protection. As the foregoing analysis illustrates, however, the subject barroom type of movement in the nude was not of the type that was contemplated as falling within this protective web.

Nude dancing, in order to be afforded constitutional protection, must be communicative in nature. There must be

something more than the "erotic" or "sensual" message that is being conveyed. As with other cases in which this Court has recognized protection for communicative conduct, nude dancing must convey a "particularized messages . . . [with a great] likelihood . . . that the message would be understood by those who viewed it."

II. ANY SPEECH ASPECTS THAT ARE ASSOCIATED WITH NUDE DANCING ARE COMMERCIAL IN NATURE ONLY

The movement and music attendant to the exhibition of nude women is done only for commercial purposes. Specifically, the women are paid to encourage and entice patrons to buy drinks or to pay to view more of the performance. The women do not present a specific message through the performance and the patrons are expected only to spend money either on the presentation or on the beverages available in the Lounge.

The courts have consistently held that pure commercial speech, that is advertising, may be afforded less first amendment protection than other forms of speech.[5]

In *Bigelow v Virginia*, 421 U.S. 809 (1975), the Supreme Court addressed the question of whether commercial speech was protected under the first amendment. The Court stated, "We conclude, therefore, that the Virginia courts erred in their assumptions that advertising, as such, was entitled to no First Amendment protection and that appellant Bigelow had no legitimate First Amendment interest. We need not decide in this

[5] "It is established that product advertising is less vigorously protected than other forms of speech. *Breard v City of Alexandria*, 341 U.S. 622, 642, 71 S.Ct. 920, 95 L.Ed. 1233 (1951); *Murdock v Com. of Pennsylvania*, 319 U.S. 105, 110-111, 63 S.Ct. 920, 87 L.Ed. 1292 (1943); *Valentine v Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942); *Banzhaf v Federal Communications Commission*, 132 U.S. App. D.C. 14, 405 F.2d 1082, 1101 (1968) cert. denied, 396 U.S. 842, 90 S.Ct. 50, 24 L.Ed. 2d 93 (1969)." *Capital Broadcasting Company v Mitchell*, 333 F.Supp. 582, 584 (D.D.C. 1971).

case the precise extent to which the First Amendment permits regulation of advertising that is related to activities the State may legitimately regulate or even prohibit." 421 U.S. at 825. In determining that commercial speech was entitled to some measure of protection, the Court stated that they "may not escape the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation. The diverse motives, means, and messages of advertising may make speech 'commercial' in widely varying degrees." 421 U.S. at 826.

In the next term, the Supreme Court, in *Virginia Pharmacy Board v Virginia Consumer Council*, 425 U.S. 748, 770 (1976), discussed the correct posture of advertising within the protections of the first amendment. "In concluding that commercial speech, like other varieties, is protected, we of course do not hold that it can never be regulated in any way. Some forms of commercial speech regulation are surely permissible."[6]

The analysis of this Court's commercial speech decisions

[6] The Court went on to state:

> There is no claim, for example, that the prohibition on prescription drug price advertising is a mere time, place, and manner restriction. We have often approved restrictions of that kind provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that in so doing they leave open ample alternative channels for communication of the information. • • •.
>
> Nor is there any claim that prescription drug price advertisements are forbidden because they are false or misleading in any way. Untruthful speech, commercial or otherwise, has never been protected for its own sake. • • •.
>
> Also, there is no claim that the transactions proposed in the forbidden advertisements are themselves illegal in any way. • • •. Finally, the special problems of the electronic broadcast medium are likewise not in this case. • • •.

425 U.S. at 771-73.

is applicable to nude barroom dancing. The regulation would not prohibit the advertisement of the dancers or any communicative message they may have through their movement, nor would it prohibit the Lounge from securing a profit through the sale of beverages to its patrons. It would simply require the dancers to provide the enticement to patrons to buy drinks attired in a bare minimum of clothing measuring no more than four square inches over various parts of the body.

Finally, the contexts in which the Supreme Court has discussed commercial speech have generally involved cases in which the commercial speech to be regulated was advertising that was directed not only at soliciting business, but it generally provided an underlyingsubstantive message or professional service. In the case of nude dancing there is no message that is being provided that will benefit society. The advertisements for medicine or legal services may be of vital interest to many consumers. The nude dancers' enticement not only does not provide beneficial information to society, it may, in fact, provide material that is offensive and harmful to many.

III. CONCLUSION

Nude barroom dancing of the variety that is the subject of this case is not communicative expression. It is purely conduct. The sole motivation underlying the performances is to titillate the patrons and to entice them to purchase the house-provided beverages.

Any speech aspects of the performances are purely commercial. Consequently, the State's ability to regulate such speech aspects is enhanced. The State is well within its authority to require that while the women are enticing patrons to purchase the house-provided beverages they must comply with the statutory requirements of minimal clothing.

A State's ability to require certain levels of decency in public is inherent in its ability to effectively govern. The lack of such standards, either in dress or behavior, will result in a lack of recognition of the authority of the State itself.

For the foregoing reasons, the decision of the Court of Appeals should be reversed.

Respectfully submitted,

Peggy M. Coleman
Counsel of Record
Benjamin W. Bull
Nikolas T. Nikas
American Family Association, Inc.
Post Office Drawer 2440
Tupelo, Mississippi 38803
(601) 844-5036

Alan E. Sears
National Family Legal Foundation, Inc.
3030 North Third Street, Suite 200
Phoenix, Arizona 85012
(602) 241-8520

James Mueller
Children's Legal Foundation, Inc.
2845 East Camelback Road, Suite 740
Phoenix, Arizona 85016

(9)

No. 90-26

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,

v.

GLEN THEATRE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

PETER BUSCEMI
ANTHONY C. ROTH
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether nude dancing in a bar or adult theatre constitutes "speech" within the meaning of the First Amendment.

2. Whether, assuming such dancing is a form of "speech," the State may apply to such conduct a content-neutral public indecency statute, which prohibits public nudity and does not seek to regulate the expression of ideas.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	3
A. Indiana's Public Indecency Statute	3
B. Respondents' Challenge To The Indiana Statute	4
C. The Initial Proceedings In Federal Court	5
D. The Proceedings After Remand	6
E. The *En Banc* Decision Of The Court Of Appeals	7
SUMMARY OF ARGUMENT	10
ARGUMENT	13
I. RESPONDENTS' NUDE DANCING IS NOT SYMBOLIC "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT	13
A. This Court Has Established A Fact-Specific Two-Part Test For Determining Whether Conduct Qualifies As Symbolic Speech	13
B. The Nude Dancing At Issue Here Does Not Qualify As Symbolic Speech Under This Court's Test	15
1. *Respondents' nude dancing was not intended to, and does not, convey a particularized message*	16
2. *There is no great likelihood that respondents' dancing would be understood by a viewer to convey a particularized message*	18

TABLE OF CONTENTS—Continued

	Page
II. ASSUMING RESPONDENTS' NUDE DANCING IS PROTECTED SPEECH, INDIANA'S PUBLIC INDECENCY STATUTE IS CONSTITUTIONAL BECAUSE IT IS CONTENT-NEUTRAL, SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND IS NARROWLY TAILORED	19
A. A Single Test Applies, Whether Indiana's Public Indecency Statute Is Deemed To Be A Regulation Of Conduct Or A Time, Place, Or Manner Restriction On Expression	20
B. Indiana's Public Indecency Statute Is Content-Neutral	21
C. Indiana's Public Indecency Statute Furthers A Substantial Governmental Interest	23
D. Indiana's Public Indecency Statute Imposes Only Reasonable Restrictions That Are Narrowly Tailored And Leave Open Ample Alternative Channels Of Communication	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES:	Page
Arcara v. Cloud Books, Inc., 478 U.S. 697 (1986)	18
Bowers v. Hardwick, 478 U.S. 186 (1986)	12, 24
Breard v. Alexandria, 341 U.S. 622 (1951)	20
California v. LaRue, 409 U.S. 109 (1972)	7
Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)	24
City Council v. Taxpayers for Vincent, 466 U.S. U.S. 789 (1984)	27
City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989)	11, 13, 15, 18
City of Newport v. Iacobucci, 479 U.S. 92 (1986)	7
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986)	12, 21
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984)	*passim*
Clark v. Indiana, 446 U.S. 931 (1980)	4
Community for Creative Non-Violence v. Watt, 703 F.2d 586 (D.C. Cir. 1983), rev'd *sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)	22
Dove v. Indiana, 449 U.S. 806 (1980)	4
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975)	25
Frisby v. Schultz, 487 U.S. 474 (1988)	25
Hicks v. Miranda, 422 U.S. 332 (1975)	4
Lehman v. City of Shaker Heights, 418 U.S. 298 (1974)	24
Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981)	24
Miller v. California, 413 U.S. 15 (1973)	20
Paris Adult Theatre I v. Slaton, 413 U.S. 49 (1973)	12, 24, 25
Peachey v. Boswell, 240 Ind. 604, 167 N.E.2d 48 (1960)	26
Regan v. Time, Inc., 468 U.S. 641 (1984)	25
Roth v. United States, 354 U.S. 476 (1957)	19, 24, 26
Spence v. Washington, 418 U.S. 405 (1974)	10, 13-14, 14, 16

TABLE OF AUTHORITIES—Continued

	Page
State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), aff'd *sub. nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980)	3, 4, 5, 22, 26
Stromberg v. California, 283 U.S. 359 (1931)	13
Texas v. Johnson, 109 S. Ct. 2533 (1989)	*passim*
Tinker v. Des Moines School District, 393 U.S. 503 (1969)	19
United States v. Albertini, 472 U.S. 675 (1985)	25, 26
United States v. Eichman, 110 S. Ct. 2404 (1990)	22
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*
Virginia Pharmacy Board v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976)	21
Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989)	22, 24, 25
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	24
CONSTITUTIONAL PROVISION:	
U.S. Const. Amend. I	*passim*
STATUTE:	
Ind. Code § 35-45-4-1	*passim*

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-26

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,

v.

GLEN THEATRE, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF THE NATIONAL GOVERNORS' ASSOCIATION, NATIONAL ASSOCIATION OF COUNTIES, UNITED STATES CONFERENCE OF MAYORS, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect the powers and responsibilities of state and local governments. This case, yet another example of the ingenuity of counsel in fashioning constitutional challenges to a State's ordinary exercise of its police power, raises issues whose resolution will have a direct and substantial impact on *amici* and their members.

Respondents challenged the Indiana public indecency statute, claiming that the statute is unconstitutional because it interferes with an alleged First Amendment right of persons to appear naked in public as part of a dance in a bar or adult theatre. In a serious departure from this Court's decisions, the court of appeals declared that the Indiana statute unconstitutionally interferes with symbolic speech protected under the First Amendment.

The decision below rests on a sweeping characterization of dance as "expression," without regard to whether the dancer intends to communicate a particularized message and without regard to whether any such message is likely to be understood by the viewer. Having declared the dance in question to be "expression," the court eschewed any further inquiry into the question whether a content-neutral statute like Indiana's public indecency law can constitutionally be applied to certain well-defined conduct, where an incidental result may be some minimal restriction on a person's right to engage in allegedly communicative acts. Instead, the court jumped directly from the premise that nude dancing is expression to the conclusion that Indiana's law is unconstitutional as applied to such dancing.

If allowed to stand, the court of appeals' reasoning would invalidate, or at least encourage attempts to invalidate, many other state and local public indecency statutes or regulations. Such a result would substantially impair the ability of *amici*'s members to enforce long-standing public indecency laws. The threatened laws were enacted pursuant to the traditional police power of state and local governments to maintain a decent society, preserve society's moral structure, and prevent the detrimental consequences that flow from the crass commercial exploitation of sex. For these reasons, *amici* submit this brief to assist the Court in its resolution of this case.[1]

[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of the Rules of the Court.

STATEMENT

A. Indiana's Public Indecency Statute

The statute at issue in this case is Indiana's public indecency statute, Ind. Code § 35-45-4-1. In relevant part, the statute provides that "[a] person who knowingly or intentionally, in a public place * * * appears in a state of nudity * * * commits public indecency, a class A misdemeanor." The law defines "nudity" as:

> the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

In 1979, several years before respondents filed their complaints, the Supreme Court of Indiana reviewed a challenge to the constitutionality of Indiana's public indecency law brought by dancers who wished to appear nude in bars and by bar owners who wished to offer such dancing. In response to a claim that the statute was unconstitutionally overbroad because it applied to speech protected under the First Amendment, the state Supreme Court acknowledged that "it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979). The court emphasized, however, that "[t]here is no right to appear nude in public" and that "public nudity itself * * * is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit." *Ibid.* The court therefore rejected the overbreadth challenge to the Indiana law. The court also rejected a claim that the statute's use of the phrase "public place" was unconstitutionally vague. *Id.* at 582-583.

Turning to the question whether the nude barroom dancing at issue was simply conduct or was expression

entitled to First Amendment protection, the *Baysinger* court observed that even the dancers themselves did not contend that the Indiana statute inhibited any "pure speech" or "the expression of any ideas." 397 N.E.2d at 587. The court concluded, therefore, that dancing nude rather than scantily clad "is conduct, not speech," and that "[t]he governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech." *Ibid.*

In two separate appeals, the dancers and bar owners appealed the *Baysinger* decision to this Court, renewing their arguments that the Indiana public indecency statute is unconstitutionally vague and overbroad. This Court dismissed the appeals for want of a substantial federal question. *Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980). These dismissals, of course, constituted rulings on the merits rejecting the vagueness and overbreadth challenges to the Indiana law. See *Hicks v. Miranda*, 422 U.S. 332, 343-44 (1975).

B. Respondents' Challenge To The Indiana Statute

In 1985, respondents in the present case filed two separate actions in the federal district court, challenging the constitutionality of the Indiana public indecency statute. Respondents sought injunctive relief barring enforcement of the statute as applied to nude dancing in an adult bookstore, theatre, or bar.

The first action involved respondent Glen Theatre, Inc., the owner of an adult bookstore ("Chippewa Bookstore") and drive-in theatre ("Chippewa Drive-In") that wished to offer nude dancing, and two dancers, respondents Gayle Sutro and Carla Johnson, who wished to dance nude at the drive-in or the bookstore. J.A. 3-4. The *Glen Theatre* plaintiffs submitted two affidavits in support of their motion for injunctive relief. Roger Judd, the manager of the Chippewa Bookstore, explained that the adult bookstore offered "nude and semi-nude" dancing and the

"showing of the female body through glass panels." J.A. 16. He also stated that the bookstore had been required to stop offering live nude dancing because of police enforcement of the Indiana public indecency statute. J.A. 17. In her affidavit, Sutro stated that she was scheduled to perform nude dances at the Chippewa Drive-In, dances that she claimed "are an attempt to communicate as well as to entertain." J.A. 14.

The second action was brought by respondent JR's Kitty Kat Lounge, Inc., a bar that wanted to offer live nude dancing, and respondent Darlene Miller, a dancer at the bar who wanted to dance nude rather than with the minimal amount of clothing required by Indiana law. J.A. 23. Plaintiffs in both cases claimed that the Indiana public indecency statute was unconstitutional as applied to nude barroom dancing. J.A. 2, 7, 21.

C. The Initial Proceedings In Federal Court

Glen Theatre and *Miller* initially were assigned to different district court judges. The court in *Glen Theatre* ruled that the Indiana public indecency statute was facially unconstitutional for overbreadth and enjoined enforcement of the statute. Pet. App. 149-158. The court in *Miller*, following a hearing at which both Miller and the owner of the Kitty Kat Lounge testified, denied plaintiffs' request for a preliminary injunction.

On the State's appeal from the district court's ruling in *Glen Theatre*, the court of appeals held that the Indiana public indecency statute was not unconstitutionally overbroad. *Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140-147). Relying on this Court's dismissal of the appeals in *Baysinger*, the court of appeals reversed the district court's injunction because the overbreadth argument had already been definitively rejected by this Court. Pet. App. 144. The court of appeals remanded for the district court to address plaintiffs' "as applied" challenge to the Indiana law. *Id.* at 146.

The court of appeals instructed the district court to "examine the plaintiffs' proffered evidence of the dancing they wish to perform and decide, whether if considered as a whole, the activity should be afforded First Amendment protection." *Id.* at 147.

D. The Proceedings After Remand

On remand, the district court consolidated *Glen Theatre* with *Miller*. The evidence before the court consisted of the affidavits submitted by respondents in support of their injunction motions, the testimony at the preliminary injunction hearing in *Miller*, a further affidavit from the owner of the Kitty Kat Lounge, and a videotape of dances that were representative of those that the Kitty Kat Lounge wanted to offer to the public.

Based on its review of this evidence, the district court concluded that the conduct at issue is "not expressive activity protected by the Constitution of the United States." *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988) (Pet. App. 130). The district court based its decision on factual findings made in the prior injunction proceedings and on its own review of the affidavits and videotape. The district court found that the dances are "not a part of any type of play or dramatic performance" but that they merely involve "a female, fully clothed initially, who dances to one or more songs as she proceeds to remove her clothing." Pet. App. 124. The court also found that, of all the dancers involved through affidavits or videotapes, only Sutro even asserted that she was making any "attempt to communicate" through her dance (*id.* at 132), while Miller admitted that she was "just entertaining, just dancing" so that customers would like her and buy more drinks. *Id.* at 133. Because it could not find any constitutionally protected expression in the performances, the district court held that the dances were "mere conduct." *Id.* at 130. The court therefore upheld the State's application of its public indecency law to prohibit nudity in respondents' dancing.[2]

The court of appeals reversed, holding that "non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection." *Miller v. Civil City of South Bend*, 887 F.2d 826, 829 (7th Cir. 1989) (Pet. App. 117). Although the panel recognized that this Court "has not explicitly held that nude dancing is expressive activity protected by the first amendment" (Pet. App. 114), it concluded that "[i]n substance, nude dancing is still expression." *Id.* at 118. The court said that the State "has not presented any legitimate grounds for defending the statute," and it therefore declined to consider the State's power to "impose reasonable time, place, and manner restrictions on protected expression" or its power to "regulate the non-expressive conduct for reasons unrelated to the suppression of speech." *Id.* at 119. The court held that application of Indiana's public indecency law to nude dancing in bars or adult theatres violates the First Amendment.

E. The *En Banc* Decision Of The Court Of Appeals

On rehearing *en banc*, the court of appeals sustained the panel decision, by a vote of 7-4. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (Pet App. 1-109). The court declared that it was "constrained to hold * * * as a matter of law, [that] non-obscene nude dancing performed as entertainment is expression and as such is entitled to limited protection under the first amendment." Pet. App. 8.

---

[2] Presumably because the Indiana public indecency statute applies to all public places, not just those serving liquor, the State did not attempt to rely on the Twenty-first Amendment to justify application of the law to the Kitty Kat Lounge. This Court has made clear, however, that a State is empowered under the Twenty-first Amendment to prohibit nude barroom dancing. See, *e.g.*, *California v. LaRue*, 409 U.S. 109 (1972); *City of Newport v. Iacobucci*, 479 U.S. 92 (1986) (per curiam).

Although acknowledging "the distinction between conduct and expression" that exists in this Court's symbolic speech cases (Pet. App. 8), the majority nonetheless rejected as "misconceived" any attempt "to distinguish between expressive and nonexpressive dance." *Id.* at 10. Instead, the court concluded that "dance as entertainment is a form of conduct that is *inherently expressive*" (*id.* at 8) (emphasis added) and that such dance "inherently embodies the expression and communication of ideas and emotions." *Id.* at 12. In the court's view, "[t]he dominant theme communicated here by the dancers is an emotional one * * * of eroticism and sensuality." *Id.* at 11. Moreover, the court said, "those who view the respective dances readily comprehend the intended message, for they advance currency to view them." *Id.* at 12.

The court of appeals was unconcerned that most of the dancers did not claim any intent to communicate, and that the only dancer who did make such a claim failed to identify any particularized message that she allegedly sought to convey. The court simply announced that it was not bound by respondents' "characterizations" of their conduct, and it rejected the district court's findings as "clearly erroneous." Pet. App. 11 n.5. Although acknowledging "the State's laudable concerns which apparently are the bases of the Indiana statute," the majority summarily concluded that "the total ban at issue here" cannot be justified either as a reasonable time, place, and manner restriction or as a regulation of expressive conduct for reasons unrelated to the suppression of speech. *Id.* at 16.

Judges Coffey, Easterbrook, Manion, and Kanne dissented. Their three opinions shared two fundamental disagreements with the majority decision.

First, the dissenting judges found no basis for concluding that the nude dancing involved in this case was "speech" or "expression" protected by the First Amend-

ment. They observed that respondents did not even claim to be conveying any idea or message, and they stressed that such a conscious intent to communicate is essential if mere purposive conduct is to be treated as expression, and thus entitled to some measure of the constitutional protection afforded to real speech. Pet. App. 71-72 (Coffey, J., dissenting); *id.* at 84-86 (Easterbrook, J., dissenting); *id.* at 101 (Manion, J., dissenting). In the dissenters' view, the district court's specific finding that "the dancers' conduct was 'not expressive activity'" was not clearly erroneous, and it required that the Indiana statute be sustained as applied to respondents. *Id.* at 72 (Coffey, J., dissenting); *id.* at 85 (Easterbrook, J., dissenting); *id.* at 101 (Manion, J., dissenting).

Second, even assuming that some protected expression was involved in respondents' nude dancing, the dissenting judges found the Indiana statute a permissible content-neutral regulation of conduct. They emphasized that the statute concerns only public nudity and does not seek to suppress free expression. "The law has nothing to do with the expression or viewpoint of the undressed person. * * * It is indifferent to whether there is a message, or to the viewpoint expressed by any message." Pet. App. 80, 83-84 (Easterbrook, J., dissenting). The dissenters also observed that the statute targeted only that conduct that the State intended to eliminate and left open "myriad ways in which [respondents] could communicate their erotic and sensual theme." *Id.* at 76 (Coffey, J., dissenting). See also *id.* at 79, 83-84 (Easterbrook, J., dissenting).

Finally, all four dissenting judges found the State's interest sufficient to justify any restriction imposed on expression by Indiana's public indecency law. All of the dissenting judges agreed that Indiana's public indecency statute properly "may express moral views about how the community should live." Pet. App. 99 (Easterbrook, J., dissenting). Judge Coffey noted that the justification for

the statute was "self-evident." *Id.* at 53. He stated that the law "implements the state's interest in public morality, a legitimate and praiseworthy goal unrelated to speech" (*id.* at 48) and that it fosters the "moral climate in which [Indiana's citizens] choose to live and raise their children." *Id.* at 51. In Judge Coffey's view, the statute also protects against various harmful effects that may be associated with public displays of nudity (such as nude dancing in bars or adult bookstores). Among these social ills, Judge Coffey listed, *inter alia*, prostitution and other crimes (*id.* at 60), degradation of women (*id.* at 57), neighborhood blight (*id.* at 65), and the spread of sexually transmitted diseases (*id.* at 65-66).

SUMMARY OF ARGUMENT

I.

This case does not involve the spoken or written word. A dancer's act of removing her last items of clothing does not constitute "speech" in any common sense of the word. Moreover, this Court has long recognized that not all conduct rises to the level of symbolic expression entitled to some limited First Amendment protection. In fact, conduct receives such protection *only* if two conditions are met. There must be a conscious intent to convey a particularized message, and there must be a great likelihood that that message will be understood by the persons viewing the conduct. See *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989); *Spence v. Washington*, 418 U.S. 405, 410-411 (1974) (per curiam). The burden of showing that conduct is expressive falls on the party claiming First Amendment protection. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984).

Although the court of appeals paid lip service to these principles, it based its decision almost entirely on the assertion that "dance as entertainment" is "inherently expressive." The court of appeals first went astray by focusing on respondents' dances rather than only on the nudity

that the Indiana statute prohibits. The court then compounded the problem by disregarding respondents' own disclaimers of any "particularized message" and by failing to provide any justification for its conclusion that the district court's factual findings were clearly erroneous. With no support other than its own say-so, the court of appeals ruled that the dances qualified as symbolic expression because they communicated an emotional "theme" of "eroticism and sensuality." The court further erred by declaring that, because customers pay to see the dances, the dancers' alleged "message" must be one that is readily understood.

As the dissenting judges correctly explained, the district court found that the nude dancing at issue involved no expressive activity, and there was no reason to disturb that finding. Respondents did not identify any particularized message they sought to convey, and, in fact, one of respondents' counsel conceded at oral argument in the court of appeals that no "political or ideological statement" was being made and no idea was being expressed. The court of appeals failed even to cite this Court's decision in *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989), and it offered no reason why nude barroom dancing should be considered more expressive than the recreational dancing that the Court there held not entitled to any First Amendment protection.

II.

Even if the dancing involved in this case did qualify as symbolic expression entitled to some limited First Amendment protection, the court of appeals erred in concluding that the Indiana public indecency statute is an unconstitutional restriction on that expression. This Court has often held that the First Amendment is not absolute and that a State may regulate or prohibit conduct—even conduct containing an expressive component—so long as it does so by content-neutral statutes unrelated to the purposeful re-

straint of expression, or through reasonable time, place, or manner restrictions.

The Indiana public indecency statute meets this description. It satisfies all of the criteria that the Court has established for such laws. See, *e.g.*, *United States v. O'Brien*, 391 U.S. 367, 376-377 (1968); *Clark*, 468 U.S. at 293. First, the statute is content-neutral; it is concerned solely with public nudity, which it prohibits regardless of whether any message is intended and regardless of what the message is. The statute is not limited to sexually oriented businesses or to dancing, and there is no claim in the case that the statute is enforced discriminatorily against expressive activity. Second, the statute serves important state interests that this Court has recognized as legitimate, including adherence to community moral standards, and promotion of the kind of social, ethical, and cultural environment desired by Indiana residents acting through their elected representatives. See, *e.g.*, *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986); *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 59-60 (1973). Third, the statute is narrowly tailored to prohibit only the conduct identified by the State as undesirable, and it leaves open ample alternative channels for the communication of any message respondents may wish to convey. As Judge Coffey correctly observed in his dissent, respondents "must only remain attired in the barest minimum of clothing during their dances, a requirement that hardly impedes the communication of the themes 'of eroticism and sensuality.'" Pet. App. 75.

ARGUMENT

I. RESPONDENTS' NUDE DANCING IS NOT SYMBOLIC "SPEECH" WITHIN THE MEANING OF THE FIRST AMENDMENT.

A. This Court Has Established A Fact-Specific Two-Part Test For Determining Whether Conduct Qualifies As Symbolic Speech.

The Court has long recognized that conduct can in some circumstances rise to the level of protected First Amendment "speech." See *Stromberg v. California*, 283 U.S. 359, 369 (1931). The Court has also recognized, however, that not all conduct qualifies as "speech" for First Amendment purposes. For example, the Court observed as recently as last year that it is possible to act with "no thought of expressing any idea" or of communicating any message, and that such nonexpressive conduct is not protected by the First Amendment. *Texas v. Johnson*, 109 S. Ct. 2533, 2538-2539 n.3 (1989).

This point is critical; otherwise, virtually every law regulating conduct would present a First Amendment issue. As Judge Posner remarked in his concurring opinion below, "[t]here is a sense in which everything we do consciously and much of what we do unconsciously is expressive * * *." Pet. App. 22. But that cannot be enough to implicate the First Amendment. In the Court's words, although "[i]t is possible to find some kernel of expression in almost every activity a person takes[,] * * * such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 109 S. Ct. 1591, 1595 (1989).

Because some conduct is protected by the First Amendment and some conduct is not, the Court years ago developed a two-part test for distinguishing between symbolic "speech" and nonexpressive conduct that triggers no constitutional protection. The test was set forth in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), and *Spence v.*

Washington, 418 U.S. 405, 409 (1974) (per curiam), and recently reaffirmed in *Johnson*, 109 S. Ct. at 2539 (citations omitted):

> While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea," we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."
>
> In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."

Thus, two conditions must be satisfied before conduct containing "some kernel of expression" can rise to the level of protected speech: 1) the person engaging in the conduct must consciously intend to convey a particularized message; and 2) there must be a great likelihood that the particularized message will be understood by persons who observe the conduct.

The burden is on "the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). Any other rule would create an unwarranted presumption that all conduct is expressive. *Ibid.* Even in cases involving obvious communicative symbols, such as flags that are "[p]regnant with expressive content," the Court has not abandoned the two-part symbolic speech test and has "not automatically concluded * * * that any action taken with respect to [the symbol] is expressive." *Johnson*, 109 S. Ct. at 2540. Rather, the Court has focused on the facts of the particular case and on the specific inquiries derived from *O'Brien* and *Spence*. See, *e.g.*, *Johnson*, 109 S. Ct. at 2544 n.8. This course is particularly appropriate where, as here, the conduct at issue does not involve any obviously communicative symbols. See *Stanglin*, 109 S. Ct. at 1595 (recreational or social dancing not protected by the First Amendment).

B. The Nude Dancing At Issue Here Does Not Qualify As Symbolic Speech Under This Court's Test.

The court of appeals' first error was in proceeding as if the Indiana public indecency statute regulated dancing rather than nudity. The statute does not even mention dancing, and it applies to all persons in Indiana, not just dancers. The law leaves respondents free to present whatever dances they wish, as long as the dancers are not naked. As both Judge Posner (Pet. App. 41) and Judge Coffey (*id.* at 70) noted in their separate opinions below, the amount of clothing required to comply with the Indiana statute is minimal. Accordingly, the appropriate question for the court to have asked was not whether respondents' dances are "expressive," but whether respondents' nudity—in particular, the removal of the last scanty items of clothing required by the State—constitutes expression.

It is difficult to imagine what separate message might have been conveyed by the dancers' nudity that was not already conveyed when respondents performed "wearing only tiny 'pasties' and a G-string" (see Pet. App. 41 (Posner, J., concurring); *id.* at 133). Neither respondents nor the court of appeals has even suggested what separate communication might have been effected by respondents' nudity, and nudity is the only relevant conduct that the Indiana statute prohibits. That should have been the end of the matter, but the court of appeals chose to focus instead on respondents' dances in their entirety. The court then erred a second time by ignoring this Court's test for symbolic speech and concluding that all "dance as entertainment" is "inherently expressive." In fact, however, neither part of this Court's test is satisfied by respondents' dancing.

1. *Respondents' nude dancing was not intended to, and does not, convey a particularized message.*

In this case, four of the five plaintiffs did not even claim that they intended to communicate anything by their conduct. Counsel for respondents in *Miller* made the point explicit at oral argument in the court of appeals: "I do not contend that there is some idea being expressed" (quoted at Pet. App. 85 (Easterbrook, J., dissenting)). Respondent Miller likewise admitted that she did not intend to convey any message by her dancing. Her purpose, she said, is merely to "try to get customers to like her so that they will buy more drinks later." Pet. App. 133. This Court has never afforded any First Amendment protection to unintended or unconscious communication, and it should not start now.

The fifth plaintiff, Gayle Sutro, is a dancer who was scheduled to perform at the Chippewa Drive-In, one of the facilities owned by respondent Glen Theatre. The record does not include any details regarding her intended performance. Sutro stated in her affidavit that her dances "are an attempt to communicate as well as to entertain." J.A. 14. She failed, however, to identify any particular message that she allegedly seeks to convey, and respondents have suggested none.

Although the Court has recognized that the message intended by particular conduct sometimes can be ascertained from the circumstances or context in which the conduct occurs, the context of respondents' dances does not disclose any particularized message that may have been intended. Unlike the situations before the Court in *Johnson* (burning of flag at anti-war, anti-Reagan demonstration during the Republican National Convention), *Clark* (sleeping in tent city on the first day of winter as part of a demonstration about inadequate care for the homeless), *Spence* (affixing peace sign to upside-down flag following the invasion of Cambodia), or *O'Brien* (burning of draft card

as part of Vietnam war protest), the nude dancing at issue here was not part of a larger political or social demonstration and did not involve any issue of public concern. The context of the dancing does not imply any particularized message that the dancers may have intended by their nudity.

Because respondents bear the burden of establishing that their conduct is symbolic speech, their failure to identify any specific message that they intended to convey dooms their claim. The district court correctly found, based on the record before it, that respondents' dances did not involve expressive activity. That finding should have been respected, particularly since respondents did not challenge it. See Pet. App. 85 (Easterbrook, J., dissenting).

The court of appeals, however, without relying on any particular facts in the record, concluded that all "dance as entertainment" is "inherently expressive" (Pet. App. 8) and that the nude dancing in this case communicated a "dominant theme" of "eroticism and sensuality." *Id.* at 11. Even if one were to accept the court of appeals' declarations at face value, they still would not satisfy the first part of this Court's test for symbolic speech. The Court has consistently required an "intent to convey a *particularized* message." *Johnson*, 109 S.Ct. at 2539 (emphasis added; citation omitted). The court of appeals has not only ignored the intent requirement but it has sought to excuse the absence of any particularized message by relying instead on a general emotional theme. That approach is not supported by this Court's decisions, and it would have the effect of converting virtually any deliberate conduct into some form of symbolic speech.

The court of appeals erroneously accuses the State of arguing that "the dance involved loses its expressive qualities as the dancers lose their clothing." Pet. App. 10. In reality, the point runs in just the opposite direction. The mere fact that nudity or sex is involved does not

transform otherwise unprotected activity into symbolic speech. Contrary to the apparent assumption of the court below, dancing does not automatically become more expressive when performed nude. If the dancing would not be protected from state regulation if the dancers were fully clothed or attired in "only tiny 'pasties' and a G-string," it does not miraculously acquire First Amendment protection when the dancer removes her last piece of clothing. Just as linking the words "sex" and "books" neither creates nor destroys First Amendment protections, so linking the words "nude" and "dancing" does not limit the State's capacity to regulate or prohibit. See *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705 (1986); *id.* at 711 (Blackmun, J., dissenting).

This Court's recent decision in *Stanglin*, 109 S. Ct. at 1595, strongly suggests, if it does not formally hold, that there is no First Amendment impediment to state or local regulation of recreational dancing. As Judge Easterbrook recognized in dissent (Pet. App. 95), dancing in bars is not different in any constitutionally significant way from dancing in a combined dance hall and roller skating rink. If the State may regulate the latter without jeopardizing any expression protected by the First Amendment, it may regulate the former as well. The result does not change when the dancer sheds her last item of clothing.

2. There is no great likelihood that respondents' dancing would be understood by a viewer to convey a particularized message.

The court of appeals' conclusion that there is a great likelihood that the nude dancing at issue here would be understood by a viewer to communicate a specific message is even more tenuous than its finding of a message in the first place. Even assuming that some particularized message was intended by the dancers, the record provides no evidence concerning the probability that reasonable viewers would understand that message.

In lieu of record evidence, the court of appeals relies entirely upon the following assertion:

> And it is apparent that those who view the respective dances readily comprehend the intended messages, *for they advance currency to view them.*

Pet. App. 12 (emphasis added). Under the court of appeals' analysis, any time people pay to see an event, whether it be a baseball game, a boxing match, or a bullfight, a court should conclude that the viewers "readily comprehend" the particularized message intended by the performers. This does not follow. The fact that viewers pay proves only that they desire to witness the event, not that they are receiving and understanding messages from the performers.

Although viewer surveys may not be necessary to show that a particularized message was understood, something other than mere paid admissions is needed. Because the record in this case offers nothing more, respondents have failed to satisfy their burden of establishing that their conduct rises to the level of symbolic speech entitled to First Amendment protection.

II. ASSUMING RESPONDENTS' NUDE DANCING IS PROTECTED SPEECH, INDIANA'S PUBLIC INDECENCY STATUTE IS CONSTITUTIONAL BECAUSE IT IS CONTENT-NEUTRAL, SERVES A SUBSTANTIAL GOVERNMENTAL INTEREST, AND IS NARROWLY TAILORED.

Even assuming that respondents' nude dancing is constitutionally protected speech, "this assumption only begins the inquiry." *Clark*, 468 U.S. at 293. First Amendment protection is not absolute. Rather, it "permit[s] reasonable regulation of speech-connected activities." *Tinker v. Des Moines School District*, 393 U.S. 503, 513 (1969). See also, *e.g.*, *Roth v. United States*, 354 U.S. 476, 482-483 (1957) (the First Amendment "gave no absolute protection to every utterance" and "was not

intended to protect every utterance"); *Miller v. California*, 413 U.S. 15, 23 (1973) (the First Amendment has "'never been treated as [an] absolute[]'") (quoting *Breard v. Alexandria*, 341 U.S. 622, 642 (1951)). Thus, even if Indiana's public indecency statute restricts expression, that does not mean that the statute is unconstitutional; it means only that the statute's constitutionality depends on whether its restrictions are permissible under the First Amendment.

A. A Single Test Applies, Whether Indiana's Public Indecency Statute Is Deemed To Be A Regulation Of Conduct Or A Time, Place, Or Manner Restriction On Expression.

In *O'Brien*, the Court articulated a test for determining whether restrictions on conduct that also have an effect on symbolic speech are constitutional. The Court held that, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct," a regulation of "the [illegible]peech element can justify incidental limitations o[illegible]t Amendment freedoms" if four conditions are met: 1) the regulation "is within the constitutional power of the Government"; 2) the regulation "furthers an i[illegible]t or substantial governmental interest"; 3) "th[illegible]mental interest is unrelated to the suppression [illegible] expression"; and 4) "the incidental restriction on [illegible]eged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 376-377.

The Court has also developed a comparable four-part test to determine the constitutionality of time, place, or manner restrictions on various forms of speech. *Clark* held that "reasonable time, place, or manner restrictions * * * are valid" if: 1) "they are justified without reference to the content of the regulated speech"; 2) "they are narrowly tailored"; 3) they "serve a significant governmental interest"; and 4) "they leave open ample alternative channels for communication of the information." 468 U.S. at 293.

The Court has recognized the substantial overlap between the two tests. For example, the Court said in *Clark* that all forms of "[e]xpression, whether oral or written or symbolized by conduct, [are] subject to reasonable time, place, or manner restrictions." 468 U.S. at 293. The Court acknowledged that the four-factor *O'Brien* test "for validating a regulation of expressive conduct * * * in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions." *Clark*, 468 U.S. at 298. A single test therefore can be applied to Indiana's public indecency statute, whether it is viewed as a regulation of conduct or as a time, place, or manner restriction on speech.

B. Indiana's Public Indecency Statute Is Content-Neutral.

Neither the court of appeals nor respondents have asserted that the regulation of public indecency falls outside the traditional police powers of state and local governments. The Court can turn immediately, therefore, to the question whether Indiana's statute is content-neutral or, to put the issue in *O'Brien*'s terms, whether the rationale for the statute is "unrelated to the suppression of free expression." 391 U.S. at 377. Content-neutral regulations are those that "are justified without reference to the content of the regulated speech." *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976), quoted in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 48 (1986). See also *Clark*, 468 U.S. at 295 (a regulation is content-neutral if it "is not being applied because of disagreement with the message presented"); *Johnson*, 109 S. Ct. at 2540 (a content-neutral statute is one that does not "proscribe particular conduct *because* it has expressive elements" and does not make "'the communicative nature of the conduct * * * [the] *basis* for singling

out that conduct for proscription' ") (emphasis in original) (quoting *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd *sub nom. Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984)); *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989).

Indiana's public indecency statute is clearly content-neutral under these definitions. By its very terms, the statute has nothing to do with expression. It prohibits public nudity (as well as public sexual intercourse and certain other specified sexual conduct in public). Assuming that public nudity can convey messages, the Indiana statute does not judge public nudity by the content of its message. Unlike the flag desecration statute held unconstitutional in *Johnson*, Indiana's public indecency statute does not prohibit conduct if it carries one message while allowing the same conduct if it carries another message. See *Johnson*, 109 S. Ct. at 2543. Unlike the flag desecration statute held unconstitutional in *United States v. Eichman*, 110 S. Ct. 2404, 2408 (1990), the Indiana statute does not serve any governmental interest related to the suppression of expression. Respondents' nude dancing would not become permissible under the Indiana law if its alleged message of sensuality and eroticism were changed or eliminated altogether. All public nudity is equally proscribed by the Indiana statute regardless of what message may be intended; the law applies equally to dancers in bars and adult bookstores, streakers at sporting events, flashers on street corners, or nudists in state parks.[3]

[3] In *Baysinger*, the Supreme Court of Indiana recognized that the State "may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved." 397 N.E.2d at 587. The court's statement does not alter the fact that Indiana's public indecency statute is content-neutral. If some public nudity must be permitted because it is "part of some larger form of expression" communicating ideas, the State would tolerate it without regard to the particular idea communicated in the larger work.

The Indiana statute does not "proscribe particular conduct *because* it has expressive elements" and does not turn on the State's agreement or disagreement with the message allegedly presented. *Johnson*, 109 S. Ct. at 2540 (emphasis in original); *Clark*, 468 U.S. at 295. Regulation of nudity is "justified without reference to the content of the regulated speech" and any communicative element that public nudity might have is not the "*basis* for singling out that conduct for proscription." The statute is therefore content-neutral within the meaning of this Court's decisions.[4]

C. Indiana's Public Indecency Statute Furthers A Substantial Governmental Interest.

The governmental interest served by Indiana's public indecency statute is "self-evident." Pet. App. 53 (Coffey, J., dissenting). The statute is intended to prevent indecent conduct in public, thereby preserving public morality and providing a more desirable social, cultural, and ethical environment for Indiana's citizens.

This interest is clearly legitimate and important. The Court has acknowledged the right of the States to main-

[4] Notwithstanding the relevant precedents from this Court, the court of appeals asserted in a footnote that the Indiana statute is "*directly* related to the suppression of free expression." Pet. App. 15 n.7 (emphasis in original). The court's explanation was that, by restricting activity of which the Indiana legislature disapproves, the statute prohibits conduct "precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Ibid.* This cannot be correct. If it were, no statute would be content-neutral. Any regulation of conduct makes some conduct unlawful. The whole point of regulation is to prevent or discourage conduct that is "contrary to the legislature's vision." By prohibiting certain conduct, the legislature does not stifle opposition to its prohibition. If a legislature were required to permit such opposition to be expressed by the very conduct that is prohibited, no statutory prohibition could avoid running afoul of the First Amendment.

tain a decent society, and it has recognized that a State may legitimately act to protect "the social interest in order and morality." *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942), quoted with emphasis in *Roth v. United States*, 354 U.S. 476, 485 (1957), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 61 (1973). In fact, the Court has emphasized that the interest of state and local governments "in attempting to preserve the quality of * * * life [within their jurisdictions] is one that must be accorded high respect." *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 71 (1976). Similarly, in *Bowers v. Hardwick*, 478 U.S. 186, 192, 196 (1986), the Court said that state laws properly may be "based on notions of morality," particularly when the laws' "[p]roscriptions * * * have ancient roots," as they do in the case of public nudity or public indecency laws.

The governmental interest served by Indiana's public indecency statute is clearly as "substantial" or "significant" as interests the Court has found adequate in the past to justify regulation that had some incidental impact on expression.[5] This portion of the Court's test for the propriety of such regulation is satisfied here.

---

[5] See, *e.g.*, *Lehman v. City of Shaker Heights*, 418 U.S. 298, 302-303 (1974) (plurality opinion) (city's interest in making its buses "rapid, convenient, pleasant, and inexpensive" justified prohibition on political advertising on the sides of city buses); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-508, 510 (1981) (plurality opinion); *id.* at 552 (Stevens, J., dissenting in part); *id.* at 559-561 (Burger, C.J., dissenting); *id.* at 570 (Rehnquist, J., dissenting) (city's interest in avoiding visual clutter was sufficient to justify prohibition on billboards); *Clark*, 468 U.S. at 296 ("substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition" allowed government to prohibit symbolic sleeping); *Ward*, 109 S. Ct. at 2756 (substantial interest in protecting citizens from unwelcome noise adequately supported requirement that performers use sound equipment and technicians provided by the city).

D. Indiana's Public Indecency Statute Imposes Only Reasonable Restrictions That Are Narrowly Tailored And Leave Open Ample Alternative Channels Of Communication.

To be constitutional, regulation that has an incidental effect on expression must be narrowly tailored to the governmental purpose and must "leave open ample alternative channels for communication." *Clark*, 468 U.S. at 293. As the Court explained last year in *Ward*, a restriction does not become constitutionally impermissible merely because it is not " 'the least intrusive means' of achieving the desired end" or because there is " 'some imaginable alternative that might be less burdensome on speech.' " *Ward*, 109 S. Ct. at 2757 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984) (opinion of White, J.), and *United States v. Albertini*, 472 U.S. 675, 689 (1985)). A regulation is sufficiently narrow "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest * * *." *Id.* at 2758. Even a "complete ban" is "narrowly tailored if it targets and eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S. 474, 485 (1988). See also *Clark*, 468 U.S. at 293-295.

This Court has never held that nudity could not be regulated or prohibited. On the contrary, the Court has indicated on several occasions that prohibitions of public nudity, such as the prohibitions found in public indecency statutes, are permissible. See, *e.g.*, *Paris Adult Theatre I*, 413 U.S. at 67 ("Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage"); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975) ("Scenes of nudity in a movie, like pictures of nude persons in a book, must be considered as a part of the whole work. * * * [S]uch nudity is distinguishable from the kind of public nudity

traditionally subject to indecent-exposure laws"); *Roth v. United States*, 354 U.S. at 512 (Douglas, J., dissenting) ("No one would suggest that the First Amendment permits nudity in public places").

In this case, Indiana's public indecency statute defines "nudity" narrowly. The Supreme Court of Indiana has also narrowly construed the phrase "public places" to include only places where people may go " 'with or without invitation and without restraint' " or places that are " 'available to all or a certain segment of the public.' " *Baysinger*, 397 N.E.2d at 583 (quoting *Peachey v. Boswell*, 240 Ind. 604, 167 N.E.2d 48, 56-57 (1960)).

The Court's test for state regulation that may affect expression "does not 'assign to the judiciary the authority to replace the [government agency] * * * or endow the judiciary with the competence to judge how much protection * * * is wise and how that level of [protection] is to be attained.' " *Albertini*, 472 U.S. at 689 (quoting *Clark*, 468 U.S. at 299). The State of Indiana has determined the amount of protection its citizens require from public indecency. That reasonable judgment should be respected, particularly since it is difficult to imagine how the nudity portion of Indiana's public indecency statute could be more narrowly tailored and still maintain some reasonable connection to the concepts of "nudity" and "indecency" as the words are commonly understood.

In addition to being narrowly tailored, Indiana's statute satisfies the requirement that "ample alternative channels of communication" be left open for respondents to communicate their alleged message. The statute involves only public conduct and does not limit "private" conduct. It does not restrict the spoken or written word, photographs, films, or any other traditional channels of communication. Perhaps most important, the statute does not ban dancing that communicates the emotional "theme" of "eroticism and sensuality" found by the court of appeals. Respondents may dance and perform stripteases

without interference from the State of Indiana so long as they wear at least the minimal amount of clothing required by law. If respondents have some message that they wish to communicate, Indiana's public indecency statute does not censor or silence that message. See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984) ("the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places").

In sum, even if some protected symbolic expression is involved in nude dancing in bars and adult bookstores, Indiana's public indecency statute imposes content-neutral, narrowly tailored restrictions in order to achieve a recognized substantial governmental interest. The court of appeals erred in holding the statute unconstitutional as applied to respondents.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PETER BUSCEMI
ANTHONY C. ROTH
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 467-7000
Of Counsel

BENNA RUTH SOLOMON
Chief Counsel
STATE AND LOCAL
LEGAL CENTER
444 N. Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445
Counsel of Record for the
Amici Curiae

November 15, 1990

(12)

Supreme Court, U.S.
FILED
NOV 15 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-26

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana; LINLEY E. PEARSON, Attorney General of Indiana; and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners,

-vs-

GLEN THEATRE, INC., et al.; DARLENE MILLER, et al.; and CIVIL CITY OF SOUTH BEND, et al.,

Respondents,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE STATES OF ARIZONA, CONNECTICUT, MISSOURI, NORTH CAROLINA, AND THE VIRGIN ISLANDS IN SUPPORT OF PETITIONERS, AMICI CURIAE

ROBERT K. CORBIN
Attorney General of
the State of Arizona

STEVEN J. TWIST
Chief Asst. Atty. General
Criminal Division
1275 W. Washington
Phoenix, Arizona 85007
Telephone: (602) 542-4686
(Attorney of Record)

Attorneys for AMICI CURIAE

CLARINE NARDI RIDDLE
Attorney General of Connecticut
55 Elm Street
Hartford, Connecticut 06106
(203) 566-2026

JOHN J. KELLY
Chief State's Attorney of Connecticut
340 Quinnipiac Street
Wallingford, Connecticut 06492
(203) 265-2373

WILLIAM L. WEBSTER
Attorney General of Missouri
P.O. Box 899
Jefferson City, Missouri 65102
(314) 751-3321

LACY H. THORNBURG
Attorney General of North Carolina
P.O. Box 629
Raleigh, North Carolina 27602
(919) 733-7387

ROSALIE SIMMONDS BALLENTINE
Acting Attorney General for the
Virgin Islands
48 B-50 C
Kronprindsens Gade
GERES Building, 2nd Floor
St. Thomas, Virgin Islands 00801
(809) 774-5666

QUESTIONS PRESENTED

1. Do the states have a compelling interest in the regulation of public nudity?

2. Is Indiana's Public Indecency statute a valid time, place and manner regulation?

3. Are the restrictions on First Amendment freedoms incidental?

4. Does the Seventh Circuit's decision conflict with applicable decisions of this Court?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CASES AND AUTHORITIES	
INTRODUCTION	1
ARGUMENTS	
I	
THE STATES HAVE A COMPELLING INTEREST IN THE REGULATION OF PUBLIC NUDITY.	3
II	
THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.	34
III	
ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.	40
IV	
THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.	48
CONCLUSION	52

TABLE OF CASES AND AUTHORITIES

Cases	Page
A. Magnano Co. v. Hamilton 292 U.S. 40 (1934)	5
Alexander v. Severson 408 N.W.2d 195 (Minn. Ct. App. 1987)	20,21
American Booksellers Ass'n, Inc. v. Hudnut 771 F.2d 323 (7th Cir. 1985)	29
Birkenshaw v. Haley 409 F. Supp. 13 (E.D. Mich., S.D. 1974)	9
Blum v. Stenson 465 U.S. 886 (1984)	4
Board of County Commissioners of Lee County v. Dexterhouse 348 So. 2d 916 (Fla. App. 1977)	25
Bowers v. Hardwick 478 U.S. 186 (1986)	30,31
Breard v. Alexandria 341 U.S. 622 (1950)	33
California v. LaRue 409 U.S. 109 (1972)	10,28
City of Chattanooga v. McCoy 645 S.W.2d 400 (Tenn. 1983)	12,27,32,51
City of Portland v. Derrington 451 P.2d 111 (1969)	6,9

Crownover v. Musick
509 P.2d 497
(Ca. 1973) 8,24,29,38,44,47

Curtis v. City of Seattle
639 P.2d 1370 (Wash. 1982) 24,25

Dallas v. Stanglin
490 U.S. ___
109 S. Ct. 1591
104 L. Ed. 2d 19 (1989) 43

Ex parte Collett
337 U.S. 55 (1949) 5

Gabriele v. Town of Old Orchard Beach
420 A.2d 252 (Me. 1980) 51

Glen Theatre, Inc. v.
Civil City of South Bend
695 F. Supp. 414
(N.D. Ind. 1988) 13,20,38

Grand Faloon Tavern, Inc. v. Wicker
670 F.2d 943 (11th Cir. 1982) 28

Hicks v. Miranda
422 U.S. 332 (1975) 50,51

Hoffman v. Carson
250 So.2d 891 (Fla. 1971) 9,13,15

Jacobellis v. Ohio
378 U.S. 184 (1964) 33

Kev, Inc. v. Kitsap County
793 F.2d 1053 (9th Cir. 1986) 26,28,39

Kew v. Senter
416 F. Supp. 1101
(N.D. Tex. 1976) 15,45,47

Koppinger v. City of Fairmont
248 N.W.2d 708 (Minn. 1976) 7,26,43

LeRoy v. Sidley
82 Eng. Reprint 1036 (1663) 7

Meredith v. Bowen
833 F.2d 650 (7th Cir. 1987) 6

Miller v. California
413 U.S. 15 (1973) 36,46

Miller v. Civil City of South Bend
904 F.2d 1081
(7th Cir. 1990) 2,4,21,30,32

New York State Liquor Authority v. Bellanca
452 U.S. 714 (1981) 28

New York v. Ferber
458 U.S. 747 (1983) 36

O'Day v. King County
749 P.2d 142 (Wash. 1988) 27,43

Olson v. City of West Fargo
305 N.W.2d 821 (N.D. 1981) 51

Paris Adult Theatre I v. Slaton
413 U.S. 49 (1973) 30,33

People v. Karns
365 N.Y.S.2d 725 (1975) 16,19

Renton v. Playtime Theatres
475 U.S. 41 (1986) 2,23,34,39

Roth v. United States
354 U.S. 476 (1957) 41

Salem Inn v. Frank
501 F.2d 18 (2nd Cir. 1974) 16

Starshock v. Shusted
370 F. Supp. 506 (D.C.N.Y. 1974) 11

State v. Baysinger
397 N.E.2d 580
(Ind. 1979) 9,12,13,48,50,51

State v. Baysinger, et al., sub nom.
Clark v. Indiana
446 U.S. 931 (1980) 50,51

State v. Nelson
178 N.W.2d 434 (Ia. 1970) 45

State v. Romero
710 P.2d 99 (N.M. Ct. App. 1985) 7

State v. Turner
382 N.W.2d 252
(Minn. Ct. App. 1986) 25

TVA v. Hill
437 U.S. 153 (1978) 5

Tr. of Iron Wkrs. L. 473 P. Tr. v.
Allied Products
872 F.2d 208 (7th Cir. 1989) 6

Truet v. State
57 So. 512 (Ala. Ct. App. 1912) 7

United States v. Biocic
730 F. Supp. 1364 (D. Md. 1990) 45

United States v. O'Brien
391 U.S. 367 (1968) 2,14,40-42,44-47

Virginia Pharmacy Board v. Virginia
Citizens Consumer Council, Inc.
425 U.S. 748 (1976) 35

Walker v. City of Kansas City, Mo.
911 F.2d 80 (8th Cir. 1990) 21,44

Yauch v. State
514 P.2d 709 (Ariz. 1973) 24,26

Authorities

18 U.S.C.
§ 1464 35
§ 2251 35

Annot., 96 A.L.R.3d 692 (1979) 7

Indiana Code
§ 35-45-4-1 2,3,5,7,45

United States Constitution
First Amendment passim

Pornography, Civil Rights and Speech, Catherine A. MacKinnon, 20 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 1, 21 (1985) 29

Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974) 36

INTRODUCTION

The States joining in this brief all have similar or related "indecent exposure" or "public indecency" statutes, ordinances, or regulations. Because the United States Court of Appeals for the Seventh Circuit's opinion in this case is so broad and far-reaching -- starting down the road to a possible constitutional challenge of their own statutes -- these parties have filed a joint brief urging the Court to reverse the lower court's decision.

It is the position of the States that they have a compelling interest in the regulation of public nudity -- an interest recognized at common law and with continuing validity -- by means of "indecent exposure" or "public indecency" laws. Further, that these laws are directed at conduct, not speech,

and that the type of nude "dancing" at issue in this case does not present a sufficient communication element to bring the First Amendment into play. In the alternative, if the Court finds that the conduct here does involve expressive activity or speech, that public nudity may still be constitutionally proscribed pursuant to Renton v. Playtime Theatres, 475 U.S. 41 (1986), as a valid "time, place, and manner" regulation or pursuant to United States v. O'Brien, 391 U.S. 367 (1968), as incidental restrictions furthering an important state interest. In any event, the States urge the reversal of the Seventh Circuit's decision in Miller v. Civil City of South Bend, 904 F.2d 1081 (7th Cir. 1990), and that the Indiana public indecency statute, Section 35-45-4-1, be declared constitutional.

ARGUMENTS

I. THE STATES HAVE A COMPELLING INTEREST IN THE REGULATION OF PUBLIC NUDITY.

A. Indiana Code Section 35-45-4-1 Is Plain And Unambiguous, And Legislative History Is Thus Unnecessary.

The States' interests in regulating or proscribing public nudity are numerous and obvious. In fact, so numerous and obvious that it is surprising that the Seventh Circuit questioned the purpose of the Indiana "public indecency" statute. The statute under review in this case, Indiana Code Section 35-45-4-1, provides in pertinent part:

> a) A person who knowingly or intentionally, in a public place:
>
> 1) engages in sexual intercourse;
>
> 2) engages in deviate sexual conduct;
>
> 3) appears in a state of nudity; or

4) fondles the genitals of himself or another person; commits public indecency, a Class A misdemeanor;

b) "Nudity" means the showing of the human male or female genitals, pubic area, or buttocks with less than a fully opaque covering, the showing of the female breast with less than a fully opaque covering of any part of the nipple, or the showing of covered male genitals in a discernibly turgid state.

Both the majority opinion and Judge Posner's concurrence question and complain about the absence of any legislative history in support of this statute. Miller v. Civil City of South Bend, 904 F.2d 1081, 1088, 1100. However, legislative history is only relevant and necessary "if the statutory language is unclear." Blum v. Stenson, 465 U.S. 886, 896 (1984).

The intention of a legislature is to be ascertained primarily from the language used in the statute. A. Magnano Co. v.

Hamilton, 292 U.S. 40, 46 (1934). Where the language of a statute is plain and unambiguous, there is no need to look for legislative purpose or history. Ex parte Collett, 337 U.S. 55 (1949). As the Court said in Collett:

> The short answer is that there is no need to refer to the legislative history where the statutory language is clear. The plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction. Gemsco, Inc. v. Walling, 324 U.S. 244, 260, 89 L.Ed. 921, 933, 65 S.Ct. 605 (1945). This canon of construction has received consistent adherence in our decisions.

See also, TVA v. Hill, 437 U.S. 153, 184 fn 29 (1978). Thus, since Indiana Code Section 35-45-4-1 is "plain and unambiguous" -- proscribing acts of sexual intercourse or deviate sexual conduct, or appearing nude, in public --

the Seventh Circuit's concerns are unwarranted. The Indiana legislature, by the clear, unequivocal language of the statute, wished to outlaw nudity and sex acts in public. Legislative history is irrelevant and unnecessary. Tr. of Iron Wkrs. L. 473 P. Tr. v. Allied Products, 872 F.2d 208, 212-13 (7th Cir. 1989). The plain language of the statute is the best evidence of its meaning. Meredith v. Bowen, 833 F.2d 650, 654 (7th Cir. 1987).

B. Public Nudity Is Conduct And A Proper Subject Of A State's Police Power.

Conduct is not protected by the First Amendment of the Constitution. Nudity, in and of itself, is clearly conduct and has traditionally been subject to the police power of the State. City of Portland v. Derrington, 451 P.2d 111, cert. denied, 396 U.S. 901 (1969);

Koppinger v. City of Fairmont, 248 N.W.2d 708, 711 (Minn. 1976). Nudity was a traditional common-law crime, an act malum in se. LeRoy v. Sidley, 82 Eng. Reprint 1036 (1663); Truet v. State, 57 So. 512 (Ala. Ct. App. 1912). Also, indecent exposure and particular acts and forms of lewdness or gross indecency with respect to sexual relations constituted criminal offenses at common law. State v. Romero, 710 P.2d 99, 101 (N.M. Ct. App. 1985); Annot., 96 ALR3d 692, 693 (1979).

Section 35-45-4-1 of the Indiana Code is directed at conduct, and to that degree, it is fully constitutional and in line with the common law prohibition against public nudity. However, the question becomes: once music is turned on in the background, does conduct which is constitutionally unprotected become of

sufficient communicative content to warrant the protection of the First Amendment? Numerous state courts have answered that question with a "no" and have held that nude "dancing" of the variety at issue in this case -- "barroom", "go-go", "strip-tease" -- is not protected.[1]

These courts have recognized that there is not a sufficient communicative element involved in barroom "dancing" or "entertainment" to bring into play the First Amendment. Rather, the courts realized that it is simply another commercial exploitation of sex and "that such conduct is nothing more than a sales gimmick." Crownover v. Musick, 509 P.2d

---

1. These state supreme courts are Arkansas, Florida, Indiana, Louisiana, Maine, Michigan, Nebraska, Oregon and Tennessee.

497, 511 (Ca. 1973). As the Oregon Supreme Court stated:

> When nudity is employed as sales promotion in . . . restaurants, nudity is conduct. As conduct, the nudity of employees is a fit subject for governmental regulation . . .

City of Portland v. Derrington, 451 P.2d at 113. See also, Hoffman v. Carson, 250 So.2d 891 (Fla. 1971).

These courts have further recognized that although "it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved," that the type of conduct involved here did "not rise to the level of a First Amendment claim." State v. Baysinger, 397 N.E.2d 580, 587 (Ind. 1979). Similarly, in Birkenshaw v. Haley, 409 F. Supp. 13, 18 (E.D. Mich., S.D. 1974), the court stated:

> It is equally clear, on the other hand, that not all forms of nude or semi-nude behavior are embodied with sufficient communicative content to warrant the protection of the First Amendment. A modern-day streaker, crying "free speech", will find no sympathetic chord in the Constitution.

In California v. LaRue, 409 U.S. 109 (1972), this Court recognized the same principle:

> But as the mode of expression moves from the printed page to the commission of public acts that may themselves violate valid penal statutes, the scope of permissible state regulations significantly increases. States may sometimes proscribe expression that is directed to the accomplishment of an end that the State has declared to be illegal when such expression consists, in part, of 'conduct' or 'action,' Hughes v. Superior Court, 339 U.S. 460, 70 S.Ct. 718, 94 L.Ed. 985 (1950); Giboney v. Empire Storage Co., 336 U.S. 490, 69 S.Ct. 684, 93 L.Ed. 834 (1949). In O'Brien, supra, [U.S. v. O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672], the court suggested that the extent to which 'conduct' was protected by the First Amendment depended on the presence of a 'communicative element,' and stated:

> 'We cannot accept the view that an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea.' 391 U.S. at 376.

409 U.S. at 117-18. This distinction is made clear in Starshock v. Shusted, 370 F. Supp. 506, 508 (D.C.N.Y. 1974), in which the court considered a particular form of entertainment offered by a local nightspot:

> Plaintiffs argue that the activities in question are an art form, and hence, may not be suppressed. It is urged that the performers' gyrations are interpretations of the accompanying music, and that they are communicating certain ideas of freedom to the assembled throng. It is asserted that this method of expression is a form of speech warranting the protection of the First Amendment.
>
> While this assertion may be valid in other circumstances, this court finds that in relation to the performance as presented, it is without merit. Plaintiffs fail in their argument to note the significant distinction between

> speech and conduct. The public exposure of sex organs and nudity in this setting is not a matter of free expression. Rather, these acts are conduct cognizable as a crime under the common law. (Citations omitted.)

In addition, the Supreme Court of Tennessee has reached the same conclusion in City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983), wherein the court stated:

> The obvious thrust of the Chattanooga ordinance is to outlaw nudity and indecent sexual conduct in public without any express or implied intent to suppress or prohibit any legitimate speech or expression entitled to First Amendment protection.

645 S.W.2d at 403. As in the instant case and Baysinger, the dancers in McCoy made no claim that their conduct involved any speech or expression of ideas entitled to First Amendment protection. Rather, "they claim that they make less money appearing scantily clad than they

make when they appear nude." Baysinger, 397 N.E.2d at 587.

In Hoffman v. Carson, 250 So. 2d 891 (Fla. 1971) the Florida Supreme Court reached the same conclusion. A "go-go dancer" challenged the Florida statute making it a crime to expose sexual organs or appear nude in public. The statute was not limited to the distribution of alcoholic beverages. The "dancer" claimed that the statute was unconstitutional as applied to her "since she was engaged in an artistic endeavor . . . (and) that her actions are interpretations of accompanying music, and that this is her means of communicating her ideas of freedom to the assembled patrons of the lounge."[2]

---

2. This should again be contrasted to the respondents' admission that they were not attempting to convey any message to the viewing patrons. Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 418 (N.D. Ind. 1988).

Id. at 893. The court disagreed with the plaintiff and held that the statute was directed at conduct, that the "dance" did not contain a sufficient expressive element to arise to a First Amendment claim, and even if it had, under an United States v. O'Brien, 391 U.S. 367 (1968), analysis, the infringement was incidental:

> The statute is not directed at First Amendment rights of free expression, nor does it concern itself with obscenity as does Fla.Stat. Chapter 847, F.S.A. Rather, it is directed at the exposure of sexual organs and nudity, a matter of conduct thought to be a crime under the common law (e.g. Commonwealth v. Broadland, 315 Mass. 20, 51 N.E.2d 961 (1943); Noblett v. Commonwealth, 194 Va. 241, 72 S.E.2d 241 (1952)), and generally considered as having a reasonable relationship to the public welfare, and, therefore, within the police power of the Legislature. See State ex rel. Church v. Brown, 165 Ohio St. 31, 133 N.E.2d 333 (1956), appeal dismissed, 352 U.S. 884, 77 S.Ct. 126, 1 L.Ed.2d 82.

* * * *

We find that appellant's performance falls short of presenting a 'speech' issue sufficiently important to outweigh the State's interest in curtailing lascivious exposure in public places. Contributing to this conclusion is the fact that appellant admits that she usually was tipped a certain amount for removing her brassiere and was tipped an additional substantial sum for removing her pants. The trial judge found that:

'Apparently the spontaneity of her 'self-expression' was in direct proportion to the monetary consideration she received from the barflies rather than from her absorption in the artistry of her dance.'

Hoffman, 250 So. 2d at 893-94. (Emphasis added.)

Other courts have reached the same result. In Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976), the plaintiff argued that the Texas statutes of "indecent exposure" and "disorderly conduct" could not be "applied to her

nude barroom performance, because of its expressive content..." Id. at 1105. The court was not impressed and noted that "the statutes in question are primarily directed at conduct..." and

> it is difficult to conceive of ideas entitled to First Amendment protection which can be solely -- or even best -- expressed by baring the anus or genitals in the circumstances forbidden by the statutes.

Id. (Emphasis added.)

Another court addressed a similar ordinance and claim of unconstitutionality in People v. Karns, 365 N.Y.S.2d 725 (1975). In challenging an ordinance of the City of Rochester, New York, the defendants claimed that their activities -- dancing in the nude -- were protected by the rights afforded under the First Amendment of the Constitution, relying on Salem Inn v. Frank, 501 F.2d 18 (2nd Cir.

1974). The court came to a different conclusion, however:

> It would seem that these arguments proposed by the court will retain little if any validity when coupled with the pronouncements contained in the Roth v. United States case cited previously. [354 U.S. 476 (1957)] In the Roth case (supra), the court went into the historical aspect of the First Amendment and the ratification by the sovereign states, and stated that despite the ratification, the states contained to themselves certain rights of action which seemingly fell under the broad wording of that same Amendment and as evidence of this the court, 354 U.S. at page 483, states:
>
> 'In light of this history, it is apparent that the unconditional phrasing of the First Amendment was not intended to protect every utterance.' (Emphasis added).

What the court in Salem Inn (supra) has stated is that dancing, by judicial interpretation is a form of speech or communication, but has failed to adopt the more accepted rule that even certain forms of speech must give way to the greater good.

* * * *

Clearly, dancing of a certain type as opposed to another, is not one of judicial interpretation and more easily reconciled with personal indications or belief. No doubt some individuals of different social standing may regard the productions 'Hair' or 'Ballet African' to be highly offensive and obscene, while others of the same strata may not. Albeit, it clearly comes under the heading of personal taste. It would seem that by interpretation, the courts in Salem Inn (supra) have adopted an attitude of judging all dancing as a legal form of communication, which this court is quite sure was not the intent. By the wildest stretch of one's imagination it is hardly conceivable that our forefathers (the framers of the Constitution) or our Supreme Court of the United States, by judicial interpretation, have as yet formulated dancing in the nude to be a form of expression.

Since the court in Salem Inn (supra) was silent as to the states' rights regarding regulation, it is only fair to point out that those regulatory powers afforded to the separate states were determined inviolate under the Ninth and Tenth Amendments to the Constitution, so long as it did not clearly violate the rights afforded under the other Amendments (here First and Fourteenth).

Karns, 365 N.Y.S.2d at 731-32. (Emphasis in original.)

The court went on to conclude in upholding the ordinance:

> The sum total of the Salem Inn case (supra) at best can be determined as a case elongating freedom of speech to include dancing, but hardly can it be determined to mean that 'nudity' coupled with dancing is such a protected right. All forms of speech and the content therein (here dancing as a form of expression or speech) were never intended by the framers of the Constitution or our Supreme Court of the United States as a protected right in deference to the greater good necessary to protect society. This proposition is firmly stated in the case of Paris Adult Theatre I v. Slaton, 413 U.S. 49, 93 S.Ct. 2628, 37 L.Ed.2d 446, wherein the court at pages 57 and 58, 93 S.Ct. at page 2635 stated:
>
> In particular, we hold that there are legitimate state interests at stake in stemming the tide of commercialized obscenity, even assuming it is feasible to enforce effective safeguards against exposure to juveniles and to passerby. Rights and interests 'other than those of the advocates

> are involved.' Breard v. Alexandria, 341 U.S. 622, 642, 71 S.Ct. 920, 932, 95 L.Ed. 1233 (1950). These interests of the public in the equality of life and the total community environment, the tone of the commerce in the great city centers, and, possibly the public safety itself. . . . ' (Emphasis added.)

365 N.Y.S.2d at 733-34. (Emphasis in original.)

Finally, in Alexander v. Severson, 408 N.W.2d 195 (Minn. Ct. App. 1987), the court addressed a factual situation very similar to the findings of fact by the District Court concerning Glen Theatre, Inc.'s business (the Chippewa Bookstore), in that, the "dancing" consisted of a nude or semi-nude body of a female displayed through glass panels. Glen Theatre, 695 F. Supp. at 419. Like the Chippewa Bookstore, customers would sit in a booth and insert coins in a timing mechanism. The distribution of alcohol was not at issue.

Like the "dancers" in the present case, the "dancers" in Alexander testified "that the primary purposes of their performances were to sexually arouse their male viewers and earn monetary compensation, either from their employer or in the form of 'tips' from customers." Alexander v. Severson, 408 N.W.2d at 197.[3]

The court found that no communicative element existed and, therefore the activity was not protected by the First Amendment. Id. at 199. In so finding,

---

3. This is not unlike the "purpose" or "message" found in pandering cases or the prurient interest prong of the Miller test in an obscenity prosecution. "To the extent that nude barroom dancing contains a message and therefore qualifies as First Amendment 'speech', it may contain a message that nonetheless is categorically unprotected by the First Amendment -- that is, an appeal to the prurient interest." Walker v. City of Kansas City, Mo., 911 F.2d 80, 87 (8th Cir. 1990).

the court stated that public nudity does not become a constitutionally protected activity "unless it comes 'within the narrow confines of legitimate artistic expression or performance' . . . None of the ["dancers'"] deposition testimony suggested an attempt to convey ideas or that their performances were conducted for artistic purposes." Id.

Courts have continuously found -- and been able to clearly distinguish -- the difference between public nudity as a part of a large artistic production (and thus deserving of constitutionally protection) and public nude "barroom dancing" -- striptease, go-go -- which does not contain an expressive element (and thus is not protected by the First Amendment). The activities of the "dancers" here certainly fall within the latter classification and warrant no protection.

C. <u>The Governmental Interest In Proscribing Nudity Is Substantial And Compelling</u>.

The numerous courts that have addressed the issue of public nudity have recognized the substantial and compelling interest of the state in regulating and proscribing it. These well-recognized interests range from the general interests of preserving "order and morality" to the specific ones of sexual assault prevention. All of these interests standing alone are sufficient to support the regulation. The State of Indiana was entitled to rely on the experiences of others and the findings summarized in other cases in enacting their "public indecency" law. <u>Renton v. Playtime Theatres</u>, 475 U.S. 41, 51 (1986).

In upholding the prohibition against public nudity, including nude "barroom dancing" as found in this case, the

courts have consistently found a valid exercise of the state's police power, based on various legitimate governmental interest: concern for public morals;[4]

---

4. Crownover v. Musick, 509 P.2d 497 (Ca. 1973) ("... it cannot be doubted that the governmental entities in the instant cases have the inherent constitutional power to regulate nude conduct in bars, restaurants, and other public places. It is clear that such regulations are justified by considerations of public morals and general welfare.").

Curtis v. City of Seattle, 639 P.2d 1370, 1375 (Wash. 1982) ("Cities in our state have the power to regulate activity such as public nudity. Such regulations are justified by considerations of public morals and general welfare, both incident to the general 'police powers' of municipalities." (J. Stafford concurring.)).

Yauch v. State, 514 P.2d 709, 711 (Ariz. 1973) ("The evil sought to be suppressed is not only the infliction of nudity upon a beholder's moral sensibilities...").

protecting societal norms;[5] preservation of public decency;[6] promotion of general welfare, discipline, "peace and good order";[7] prevention of degradation

---

5. State v. Turner, 382 N.W.2d 252, 254-55 (Minn. Ct. App. 1986) ("The park board enacted (the ordinance) to further what the park board perceived to be a legitimate governmental interest, protecting societal norms. . . . Protection of society's norms is a legitimate legislative goal.").

6. Turner, 382 N.W.2d at 255 ("The trial court found that (the ordinance) advances a legitimate governmental interest in the preservation of public decency and order. We concur.").

7. Board of County Commissioners of Lee County v. Dexterhouse, 348 So. 2d 916 (Fla. App. 1977) ((Prohibiting public nudity promotes) "discipline and good order of persons while in establishments...").

Curtis, 639 P.2d at 1375 ("The courts below determined as much, the municipal court stating that this ordinance concerned a 'clear and important governmental interest in the welfare and morals of the public and in maintaining peace and good order in the city.'

These regulations 'reflect legitimate state interests in maintaining comprehensive controls over harmful, constitutionally unprotected conduct.'" (Citations omitted. J. Stafford concurring.)).

of person exposed;[8] prevention of prostitution and pandering;[9] preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct attendant thereto;[10] controlling sites

---

8. Yauch, 514 P.2d at 711 ("The evil to be suppressed is...the public degradation and debasement of the individual exposed.").

9. Kev, Inc. v. Kitsap County, 793 F.2d 1053, 1056, 1059 (9th Cir. 1986) ("Law enforcement officials from Kitsap and surrounding counties testified that 'soft drink, topless dancing' establishments in adjacent counties were the sites of crime problems such as prostitution and drug dealing.... The County has a legitimate and substantial interest in preventing social problems that accompany erotic dance studios and threaten the well-being of the community.").

10. Koppinger v. City of Fairmont, 248 N.W.2d 708, 711 (Minn. 1976) ("In addition to these moral interests, the city may have further valid interests in preventing public commercial exploitation of sex and acts of rape, prostitution, and other disruptive and disorderly conduct attendant thereto."). (cont'd)

of crime problems, such as, drug dealing and other illegal conduct;[11] and concern

---

(No. 10 cont'd)

In case after case, the courts have noted the "disorderly conduct" associated with the nude "dancing" establishments. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983) ("After performing the dance each defendant went to a different table and each defendant was observed allowing a male patron to fondle her breasts."); O'Day v. King County, 749 P.2d 142, 145 fn.2 (Wash. 1988) ("Respondent . . . was charged . . . for allegedly performing a table dance during which she exposed her breasts below the areola, rubbing the same against a customer's face, exposed her pubic hair, touched the genital area of a customer, an performed an act simulating oral sex.

"Respondent . . . was charged . . . for allegedly performing a dance during which she sat on a customer's lap, rubbed her buttocks up and down against the customer's genital area, simulating sexual intercourse, and rubbed her breasts against the customer's face.

"Respondent . . . was charged . . . for allegedly performing a table dance during which she rubbed her buttocks on a customer's legs, exposed her pubic hair and performed an act simulating oral sex.

"Respondent . . . was charged . . . for allegedly performing a table dance during which she exposed her breasts below the areola, exposed her pubic hair and vaginal area, rubbed her breasts against a customer's hands and face, and rubbed her legs and chest against a

for sexual discrimination.[12]

All of these are legitimate governmental interests, compelling or

---

(No. 10 cont'd)
customer's genital area."); and Grand Faloon Tavern, Inc. v. Wicker, 670 F.2d 943 (11th Cir. 1982) ("The record in the instant case contains the stipulated purpose and believed effect of the ordinance, the deposition of Police Chief Roger Wicker and a fifty-two page listing of the police calls made to and around the Booby Trap between May 6, 1977 and October 31, 1979. The stipulation is essentially equivalent to the "findings" relied on in Bellanca. The report of police calls reveals that many of the activities occurring in and around the Booby Trap were of the same nature and severity as those cited by the Court in LaRue, including prostitution (in some instances by the female dancers), indecent exposure, rape, and numerous assaults. The testimony of Police Chief Wicker provides the necessary linkage between the stipulated purpose of the ordinance and the problems allegedly justifying it."). See also California v. LaRue, 409 U.S. 109 (1972), and New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).

11. Key, 793 F.2d at 1056, 1059 ("the sites of crime problems such as . . . drug dealing, prostitution, and other social ills..."); see also Grand Faloon Tavern, Inc., 670 F.2d at 949-51.

substantial in nature. The Seventh Circuit expressed concern that this

---

12. Crownover v. Musick, 509 P.2d 497, 509 (Ca. 1973) ("Topless" waitresses, who mingle with customers, may stimulate breaches of peace amongst a bar's largely male clientele. Tawdry establishments featuring nudity as a commercial exhibition and sales promotion may be detrimental to the general welfare of the surrounding community."); and see Yauch, 514 P.2d at 711.

See also American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 325-29 (7th Cir. 1985), aff'd, 475 U.S. 1001 (1986) ("Those supporting the ordinance say that it will play an important role in reducing the tendency of men to view women as sexual objects, a tendency that leads to both unacceptable attitudes and discrimination in the workplace and violence away from it. . . . Therefore, we accept the premise of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets." (citing to Catherine A. MacKinnon, Pornography, Civil Rights and Speech, 20 Harv. Civ. Rts. -- Civ. Lib. L. Rev. 1, 21 (1985)).).

legislation was simply a moral one: "The State's position, therefore, distills down the assertion that nude dancing is distasteful and/or morally repugnant." Miller, 904 F.2d at 1086. As demonstrated above, this is not the case. However, assuming for argument's sake that Indiana's statute was based only on a concern for public morality, this Court has recognized that interest as a legitimate concern for state regulation. In Paris Adult Theatre I v. Slaton, 413 U.S. 49, 61 (1973), the Court stated:

> In deciding Roth, this Court implicitly accepted that a legislature could legitimately act on such a conclusion to protect 'the social interest in order and morality.' Roth v. United States, 354 U.S. at 485.

Again, in Bowers v. Hardwick, 478 U.S. 186, 196 (1986), the Court indicated that laws could be based on notions of morality and tradition:

> Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if the laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

In Bowers the Court stressed that the proscriptions against sodomy had ancient roots, that sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 states when the First Amendment was adopted.

Id. at 192. The same can be said about

the public nudity statute at issue in this case, i.e., that it has ancient roots, was a common law offense, and near universal statutory proscription. Miller, 904 F.2d at 1108. There is no doubt that the framers of the Constitution and the Bill of Rights did not envision the constitutional protection of public nudity. As a Tennessee court stated so accurately:

> It is a travesty to allow nude and crude public exhibitors of the human body, the privilege of asserting the rights of persons who contribute to society's permanent values and are entitled to First Amendment protection, and to read into a public indecency statute an intent to suppress free speech and expression. This Court is not willing to follow those cases that would recognize defendants' First Amendment claim of overbreadth as valid.

McCoy, 645 S.W.2d at 403.

The Court has also approved the compelling governmental interest of

maintaining a "decent society." As the Court recognized in response to the defendants' argument that any obscene materials used by "consenting adults" were constitutionally protected: "Rights and interest 'other than those of the advocates are involved' . . . there is a 'right of the Nation and of the States to maintain a decent society . . . .'" Paris Adult Theatre I v. Slaton, 413 U.S. 49, 58-60 (1973) (quoting Justice Reed, Breard v. Alexandria, 341 U.S. 622, 642 (1950) and Chief Justice Warren, Jacobellis v. Ohio, 378 U.S. 184, 199 (1964) (dissenting opinion)). The Court went on to say:

> The sum of experience, including that of the past two decades, affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by

> crass commercial exploitation of sex. Nothing in the Constitution prohibits a State from reaching such a conclusion and acting on it legislatively simply because there is no conclusive evidence or empirical data.

413 U.S. at 63.

II. THE INDIANA PUBLIC INDECENCY STATUTE IS A VALID TIME, PLACE AND MANNER REGULATION.

A governmental entity, when acting to further legitimate ends of the community, may impose incidental burdens on free speech. Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986). Assuming that the "barroom" dancing at issue here is protected "speech" or "expression," content-neutral time, place, and manner regulations are acceptable so long as they are designed to serve a substantial governmental interest and do not unreasonably limit alternative avenues of communication. 475 U.S. at 47. A regulation is "content-neutral" if it is

justified without reference to the content of the regulated speech. 475 U.S. at 48; Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976).

There is a fundamental difference between statutes that are "content-based" and those that are "content-neutral." "Content-based" statutes focus on, and generally proscribe, certain unlawful speech. For instance, they proscribe the distribution of obscene speech and the possession and dissemination of speech which is child pornography.[13] Such laws are based on objections to the "content" of the speech itself. It is unnecessary for a prosecutor to establish

---

13. See, e.g., 18 U.S.C. Section 1464 proscribing the distribution of obscene matter and 18 U.S.C. Section 2251 proscribing the distribution of child pornography. Virtually all states have similar laws.

the harmful effects or consequences of such unlawful speech. Such speech has no protection under the United States Constitution.[14] "Content-based" laws generally seek to eradicate the unlawful and constitutionally unprotected speech.[15]

Time, place and manner regulation is primarily concerned with laws that are "content-neutral." Such laws focus on

---

14. Miller v. California, 413 U.S. 15, 23 (1973) ("this much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment"); New York v. Ferber, 458 U.S. 747, 753 (1983) ("child pornography . . . [is] a category of material outside the protection of the First Amendment").

15. For example, false advertising, speaking words which amount to a conspiracy or obstruction of justice, sedition, incitement, yelling "FIRE!" in a crowded theatre when there is no fire, using words which constitute a bribe, and committing perjury under oath. See Where Do You Draw the Line?, ed. Victor B. Cline (Brigham Young University Press, 1974).

the negative secondary consequences or harmful effects that certain speech and speech-related activities cause. These laws regulate the time, place, and manner of these activities in order to minimize or vitiate the harmful effects.

The Indiana public indecency statute in issue regulates the place and manner of activity. The substantial governmental interests in proscribing public nudity have been discussed previously, they include but are not limited to: preservation of the moral structure; right to a decent society; prevention of sexual assaults and prostitution; and elimination of sexual exploitation of women. The purpose of the Indiana statute is to further these goals by prohibiting public nudity. It has nothing to do with content or speech. Under the facts of this case, the

"dancers" are entitled to express any opinions or ideas they wish (although the record clearly demonstrates that they admit that they were not attempting to convey any message, other than to entertain and to increase the patrons' thirst, as the District Court so found). Glen Theatre, Inc. v. Civil City of South Bend, 695 F. Supp. 414, 419-21 (N.D. Ind. 1988). The state only requires that they must wear a minimal amount of covering, that is, the manner in which they "dance." Crownover v. Musick, 509 P.2d at 511 ("[W]e do not think it is unreasonable to regulate the form, or manner of the communication." (Emphasis in original.)) Specifically, they may express political, scientific, artistic or prurient messages in their "dance," but they must be at least scantily clad in order to comply with the statute.

This regulation is equally applied to others who might wish to respond. Renton, 475 U.S. at 48-49 ("The ordinance does not contravene the fundamental principle that underlies our concern about 'content-based' speech regulations: that 'government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored, or more controversial views' (Citation omitted).")

Further, these minimal or incidental requirements do not unreasonably limit alternative avenues of communication, nor do they significantly burden First Amendment rights. As the Ninth Circuit stated in Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986), when discussing distance and stage required for barroom dancers:

> While the dancer's erotic message may be slightly less effective from ten feet, the ability to engage in the protected expression is not significantly impaired. Erotic dancers still have reasonable access to their market.

793 F.2d at 1061.

Similarly, the "dancers" message (if any) "may be slightly less effective" wearing scant attire, however, the burden is insignificant. Thus the regulations are reasonable time, place, and manner restrictions that only slightly burden speech.

III. ANY RESTRICTIONS ON FIRST AMENDMENT FREEDOMS ARE INCIDENTAL AT MOST.

The United States Supreme Court has recognized the right of cities and states to regulate offensive conduct in public places even though it may involve expressive activity or speech. United States v. O'Brien, 391 U.S. 367 (1968). This important right was acknowledged in Miller v. California, 413 U.S. 15 (1973):

> Although we are not presented here with the problem of regulating lewd public conduct itself, the States have greater power to regulate nonverbal, physical conduct than to suppress depictions or descriptions of the same behavior.

413 U.S. at 26 n.8. Even Justice Douglas acknowledged this in his dissenting opinion in Roth v. United States, 354 U.S. 476 (1957):

> No one would suggest that the First Amendment permits nudity in public places . . . . Government should be concerned with antisocial conduct, not with utterances.

354 U.S. at 512-13. It is also clear that:

> When 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

O'Brien, 391 U.S. at 376. Therefore, assuming for the purpose of this argument that nude "barroom dance" involves expression, it does not follow that all

regulation of it is forbidden. Indeed, governmental regulation is permissible if certain conditions are met, as set forth in O'Brien:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

391 U.S. at 377.

It is proper to analyze this case in light of O'Brien, because "speech" and "nonspeech" are combined in the same course of conduct. Nudity -- the condition or state of being unclothed -- is conduct or activity. Nudity is not protected expression, but conduct, which states have a substantial interest in regulating via its police power.

Koppinger, 248 N.W.2d at 711. However, dance may be classified as a form of expression under some circumstances. O'Day v. King County, 749 P.2d 142 (Wash. 1988); but see Dallas v. Stanglin, 490 U.S. ___, 109 S. Ct. 1591, 104 L. Ed. 2d 19, 25-26 (1989) ("It is possible to find some kernal [sic] of expression in almost every activity a person undertakes - for example, walking down the street, or meeting one's friends at a shopping mall -- but such a kernal [sic] is not sufficient to bring the activity within the protection of the First Amendment. We think the activity of these dance-hall patrons -- coming together to engage in recreational dancing -- is not protected by the First Amendment.").[16] Thus, in

---

16. "While the precise sort of dancing at issue in Stanglin was ballroom rather than 'go-go' dancing, it turns (cont'd)

this case, a combination of conduct (nudity) and possible expression ("dancing") exist together and the four-prong test of O'Brien is applicable.

Other courts which have examined similar statutes and ordinances, have used the O'Brien framework of analysis to determine their constitutionality, and all have come to the same conclusion -- that regulation of public nudity is a compelling state interest, within the state's police power, and any restrictions on "speech" are incidental at most. Crownover, 509 P.2d at 511-12;

(No. 16 cont'd)
the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes." Walker v. City of Kansas City, Mo., 911 F.2d 80, 89 (8th Cir. 1990).

Kew, 416 F. Supp. at 1105; and Koppinger, 248 N.W.2d at 711-12. See also State v. Nelson, 178 N.W.2d 434, 440-42 (Ia. 1970) (Where court affirmed an indecent exposure conviction even though "political" speech protesting commercial exploitation of sex was claimed by disrobers.).

Does this regulation, Indiana Code Section 35-45-4-1, satisfy O'Brien? First, (as set forth in Section I(B) of this Brief), there can be no question that "regulation of indecent exposure and of conduct inducing to breaches of the peace are traditional and proper subjects of the police power . . . ." Kew v. Senter, 416 F. Supp. at 1105 (N.D. Tex. 1976). Also, in United States v. Biocic, 730 F. Supp. 1364 (D. Md. 1990), the court found:

> In our system of government, the states and their subdivisions are the repositories of the general police power, which can be utilized to proscribe conduct that the community finds offensive to its sense of decency.

730 F.2d at 1366. This is the underlying authority on which the entire line of obscenity cases has been upheld. Cf. Miller v. California, 413 U.S. 15 (1973).

Nor can their be serious debate concerning the governmental interest at issue here. (See, Section 1(C) of Brief.) Certainly this regulation furthers an important or substantial governmental interest -- indeed, interests (in that they are numerous and well-established).

The third part of the O'Brien test is whether the governmental interest is unrelated to the suppression of free expression. O'Brien, 391 U.S. at 377. Clearly, the Indiana "public indecency"

statute is unrelated to speech or its suppression. The regulation is aimed at conduct -- public nudity -- not speech. Kew v. Senter, 416 F. Supp. 1101 (N.D. Tex. 1976).

Finally, the restriction, if any, on First Amendment freedoms caused by this prohibition against public nudity is incidental and no greater than is essential to the furtherance of Indiana's legitimate interests. Not all nudity is proscribed, simply public nudity. The "actor" remains free to speak and express him or herself freely, but he or she "cannot appear with genitals or breasts exposed" while doing so. Crownover v. Musick, 509 P.2d at 512. Therefore the statute meets the requisite condition of O'Brien and is constitutionally valid.

IV. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT.

The Indiana Supreme Court previously held this statute constitutional in State v. Baysinger, 397 N.E.2d 580 (Ind. 1979). The facts in that case are almost identical to the ones at bar. Defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. 397 N.E.2d at 583. The Court responded:

> Under out statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates

to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction of nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this context. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and

> standards to be used in a determination of obscenity when required for different materials or performers.

397 N.E.2d at 587 (emphasis added). Thus the court held, in light of the facts before them, that this type of "barroom" dancing was not constitutionally protected. However, the court recognized that under certain other facts, nudity in public might be constitutionally protected expression. Again, the facts in Baysinger are identical to the facts of the present case.

Baysinger, by itself, only has precedential value for Indiana courts. However, on May 12, 1980, this Court dismissed the Baysinger appeal for want of a substantial federal question. State v. Baysinger, et al., sub nom. Clark v. Indiana, 446 U.S. 931 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975),

a dismissal of an appeal from a state court upholding a state statute against federal constitutional attack, for want of a substantial federal question, is a ruling on the merits, with precedential force for all courts except the Supreme Court itself. Although the Seventh Circuit did not feel bound by precedent, other courts have felt obligated to follow Baysinger. City of Chattanooga v. McCoy, 645 S.W.2d 400 (Tenn. 1983); Gabriele v. Town of Old Orchard Beach, 420 A.2d 252 (Me. 1980); and Olson v. City of West Fargo, 305 N.W.2d 821 (N.D. 1981).

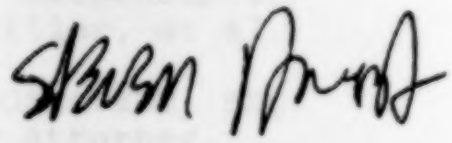
Rather than speculating how the Supreme Court would rule on this issue the Court of Appeals should have followed the precedent already established by Baysinger and Hicks.

CONCLUSION

For the foregoing reasons, Amici support the petitioners in this matter.

Respectfully submitted,

ROBERT K. CORBIN
Attorney General



STEVEN J. TWIST
Chief Asst. Atty. General
Criminal Division
(Attorney of Record)

Attorneys for AMICI CURIAE

CERTIFICATE OF SERVICE

THREE COPIES of this Brief were mailed November 15th, 1990, to:

CHARLES A. ASHER, ESQ.
205 First Bank Building
205 West Jefferson Blvd.
South Bend, Indiana 46601
(219) 233-9341
Counsel for Respondents
Darlene Miller, et al.

ROBERT C. ROSENFELD, ESQ.
Deputy City Attorney
1400 County-City Building
South Bend, Indiana 46601
(219) 284-9241
Counsel for Respondents
Civil City of South Bend, et al.

LEE J. KLEIN, ESQ.
East Brook Plaza
4121 Okemos Road, Suite 20
Okemos, Michigan 48864
(517) 349-8666
Counsel for Respondents
Glen Theatre, Inc., et al.

STEVEN J. TWIST
Chief Asst. Atty. General
Criminal Division
1275 West Washington
Phoenix, Arizona 85007
(Attorney of Record)

CRM90-0652
5403D jd/ls (M)

Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

(13)

No. 90-26

In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, et al.,

Petitioners,

v.

GLEN THEATRE, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF THE GEORGIA ON PREMISE & LOUNGE ASSOCIATION, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 East Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Counsel of Record for Amicus Curiae

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether striptease dancing or nude performance dancing is a form of expression protected by the First Amendment.

2. Whether the state may constitutionally apply its criminal public indecency statute to such expression.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

INTEREST OF THE AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. NUDE DANCE ENTERTAINMENT IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT 5

II. THE PARTICULAR NUDE DANCE PERFORMANCES IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION 14

III. INDIANA'S PUBLIC INDECENCY STATUTE CANNOT BE APPLIED CONSTITUTIONALLY TO THE PERFORMANCES IN THIS CASE 19

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES:

Atwood v. Purcell, 402 F. Supp. 231 (D. Ariz. 1975) 8

BSA, Inc. v. King County, 804 F.2d 1104 (9th Cir. 1986) 7

Cabaret Entertainment v. Alcoholic Bev. Control Comm., 393 Mass. 13, 468 N.E.2d 612 (1984) 8

California v. LaRue, 409 U.S. 109 (1972) 6, 20

Cohen v. California, 403 U.S. 15 (1971) 3, 13

Commonwealth v. Sees, 374 Mass. 532, 373 N.E.2d 1151 (1981) 8

Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988) 8

Doran v. Salem Inn, 422 U.S. 922 (1975) 6, 20

Function Junction v. City of Daytona Beach, 705 F. Supp. 544 (M.D. Fla. 1987) 8

FW/PBS, d/b/a Paris Adult Book Store II v. City of Dallas, ___ U.S. ___, 110 S. Ct. 596 (1990) 7

Glen Theatre, Inc. v. Civil City of South Bend, 726 F. Supp. 728 (N.D. Ind. 1985), *rev'd sub. nom. Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), *on remand Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414 (N.D. Ind. 1988), *rev'd sub. nom. Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989), *and on rehearing en banc rev'd*, 904 F.2d 1081 (7th Cir. 1990) 3, 5, 8, 14, 18

Harris v. Entertainment Systems, Inc., 386 S.E.2d 140 (Ga. 1989) 1

International Food & Beverage Systems v. Fort Lauderdale, 794 F.2d 1520 (11th Cir. 1986) 7

TABLE OF AUTHORITIES – Continued

Page

Kev, Inc. v. Kitsap County, 793 F.2d 1053 (9th Cir. 1986) 7

Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985) 7

Leverett v. City of Pinellas Park, 795 F.2d 1536 (11th Cir. 1985) 7

Massachusetts v. Oakes, ___ U.S. ___, 109 S. Ct. 2633 (1989) 7

Mickens v. City of Kodiak, 640 P.2d 818 (Alaska 1982) 8

Salem Inn, Inc. v. Frank, 501 F.2d 19 (2d Cir. 1974), *on remand*, 522 F.2d 1045 (2d Cir. 1975) 14

Schad v. Mount Ephraim, 452 U.S. 61 (1981) 3, 5, 6, 7, 15

Sekne v. City of Portland, 81 Or. App. 630, 726 P.2d 959 (Or. 1986) 8

Spence v. Washington, 418 U.S. 405 (1974) 15

State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), *aff'd sub. nom. Clark v. Indiana*, 446 U.S. 931 (1980) and *Dove v. Indiana*, 449 U.S. 806 (1980) 2, 3, 4, 19, 20

Stromberg v. California, 283 U.S. 539 (1931) 15

Texas v. Johnson, ___ U.S. ___, 109 S. Ct. 2533 (1989) 4, 15, 18

TABLE OF AUTHORITIES – Continued

Page

Tolbert v. City of Memphis, Tenn., 568 F. Supp. 1285 (W.D. Tenn. 1983) 8

United States v. Eichman, ___ U.S. ___, 110 S. Ct. 2404 (1990) 15

Walker v. City of Kansas City, Mo., 691 F. Supp. 1243 (W.D. Mo. 1988) 8

Ward v. Rock Against Racism, ___ U.S. ___, 109 S. Ct. 2746 (1989) 15

Young v. American Mini Theatres, 427 U.S. 50 (1976) 20

Young v. Arkansas, 474 U.S. 1070 (1986) 7

CONSTITUTIONAL PROVISION:

U.S. Const. Amend. I ..... *passim*

STATUTES:

1988 Ga. Laws 212 1

Ind. Code § 35-45-4-1 2

LAW REVIEW ARTICLES:

Note, "Post-Modern Art and the Death of Obscenity Law," 99 Yale L. Rev. 1359 (1990) 16

Smith, "Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire," 4 J. Contemp. Health and L. Policy 155 (1988) 11

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES:

Atlanta Constitution, December 25, 1987 1

Bland, A., *A History Of Ballet And Dance In The Western World* (1976)..... 8

Blom, Lynn and Chaplin, L. *The Intimate Act Of Choreography* (1982)..... 12

Cheshire, David, "Eroticism in the Performing Arts," in Webb (ed.), *The Erotic Arts* (1983) 9

Corio, Ann, *This Was Burlesque* (1968)..... 10

Duncan, Isadora, "The Art of Dance," in Steinberg (ed.), *The Dance Anthology* (1980)..... 10

Laufe, Abe. *The Wicked Stage: A History of Theater Censorship and Harassment in the United States* (1978) 10

Marks. J., *A Pictorial History Of The Dance* (1962) 13

Sobel, Bernard, *A Pictorial History of Burlesque* (1956) 10, 12, 13

Sorrell, Walter, *Dance In Its Time* (1981) 9, 17

Steinberg, Cobbett (ed.), *The Dance Anthology* (1980) 10

Wall Street Journal, July 15, 1988 1

Washington Times, May 18, 1988..... 1

Webb, Peter (ed.), *The Erotic Arts* (1983)..... 9

Zeidman, Irving, *The American Burlesque Show* (1967) 10, 12

INTEREST OF AMICUS CURIAE

The Georgia On Premise & Lounge Association, Inc. is a trade association, organized in 1986 under the laws of the State of Georgia. The Association's members are entertainment businesses in Georgia, primarily nightclubs, that offer live stage entertainment, including comedy acts, striptease acts, and nude performance dance routines set to contemporary music. Association members have provided this type of nightclub entertainment to thousands of adult patrons.

The national media have reported on the entertainment presented at Association members' nightclubs. *See*, Wall Street Journal, July 15, 1988, at 1; Washington Times, May 18, 1988, at E1. The editorial page of The Atlanta Constitution remarked that "[n]ude dancing isn't everybody's idea of good entertainment . . . [b]ut the practice is long-established and widely enjoyed in Atlanta and the nude dancing here is among the nation's tamest. . . . The better-run clubs are an important adjunct to the city's vital convention trade. . . ." Atlanta Constitution, December 25, 1987 at 22-A.

In 1989 one of the Association's members challenged the constitutionality of a newly-passed Georgia statute (1988 Ga. Laws 212) which, among other things, prohibited nude dance entertainment on premises where alcoholic beverages were sold or dispensed. Ultimately, the Georgia Supreme Court in *Harris v. Entertainment Systems, Inc.*, 386 S.E.2d 140 (Ga. 1989), invalidated the Act on overbreadth grounds because it infringed upon the free speech protections of the Georgia Constitution.

The Georgia Supreme Court's ruling allowed Association members to continue presentation of nude dance performances for adult patrons. Hence, the Association, its members and their patrons are keenly interested in the present litigation.

For these reasons, the Association submits this brief *amicus curiae* to assist the Court in its resolution of this case. Letters of consent to appear *amicus curiae* have been received from the attorneys for the State of Indiana and the respondents.

SUMMARY OF ARGUMENT

In *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom., Clark v. State*, 446 U.S. 931 (1979) and *Dove v. State*, 449 U.S. 806 (1980), the Indiana Supreme Court upheld the constitutionality of the state public indecency statute, Ind. Code § 35-45-4-1, concluding that it was not overbroad even though it could be enforced against nude dance entertainment. The court found nude dancing generally, as well as the particular performances there, to be devoid of expression such that the statute did not infringe on protected activity.

Some six years later the issue of First Amendment protection for nude dance performances in Indiana was raised anew, but in federal district court. Following a series of appeals and remands, a majority of the Court of Appeals for the Seventh Circuit, sitting *en banc*, concluded that the nude dance or striptease routines performed by respondents Gayle Sutro, Darlene Miller and Carla Johnson did express ideas protected under the First

Amendment, even though their presentations differed from more mainstream forms of dance. *Miller v. Civil City of South Bend*, 904 F.2d 1081, 1087 (7th Cir. 1990).

The Court of Appeals decision was supported by prior decisions of this Court. In *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981), adult bookstore owners presenting live nude dance entertainment challenged a municipal zoning ordinance that, by interpretation, banned all live entertainment in the community. The Court declared the ordinance unconstitutionally overbroad, partly because it prohibited nude dance performances entitled to First Amendment protection. *Schad*, as well as other opinions from this Court, intimated that performances of this type express ideas and emotions to an extent warranting constitutional protection.

The court in *Baysinger* could find none of the expressive elements of dance in the performances it reviewed. Here, however, the Court of Appeals did find communicative elements, such as emotional theme, the presence of an audience, musical accompaniment, and stylized movement in the respondents' dance routines. Those findings were well-supported in the record. Moreover, the history of nudity in contemporary dance, as well as striptease dance, demonstrates that both are legitimate expressive traditions which, like other forms of entertainment, qualify for First Amendment protection.

While respondents' performances were graded to be inferior in artistic and aesthetic quality, when compared to classical ballet, the Court of Appeals rightly avoided deciding the constitutional issue according to matters of taste or style. *Cohen v. California*, 403 U.S. 15, 25 (1971).

The state contends nonetheless that respondents' dances fall outside the concept of "speech" and constitute essentially thoughtless "conduct" unworthy of constitutional protection. To make this argument, the state resorts to an analysis based upon this Court's political speech cases. *E.g., Texas v. Johnson*, ___ U.S. ___, 109 S.Ct. 2533 (1989). But the determination as to whether a non-obscene painting, photograph, play, musical composition, or a dance performance is constitutionally protected from criminal prosecution based on concepts of indecency should not depend on whether the work is characterized by some "particularized message" or by a requirement that the message be understood by the audience. The use of such a test to measure whether artistic works fall within the First Amendment's reach would be both unworkable and absurd, especially given the non-programmatic and non-representational aspects of many works of art.

Nonetheless, if it is assumed that such criteria are appropriate to determine when artistic performances qualify for First Amendment protection, respondents' non-obscene dance routines sufficiently communicated themes of eroticism and sensuality that would be understood by their audiences.

Since respondents' dance performances were sufficiently communicative of ideas, the *Baysinger* decision would suggest that the state "may be constitutionally required to tolerate or to allow" these particular performances. 397 N.E.2d at 587. However, the state offers several reasons why the statute could be enforced constitutionally against the respondents. The state's claims are without merit, however, because the Indiana public indecency statute, as interpreted in *Baysinger*, is not a content-

neutral statute. Moreover, the state has failed to identify any substantial governmental interest, unrelated to the suppression of free expression, which would justify the enforcement of the statute against these types of dance performances. Indeed, the scope of the statute, as interpreted in *Baysinger*, betrays a governmental intent to censor erotica, rather than promote some substantial governmental interest. The statute's ban on nudity is not a reasonable "time, place and manner" restriction because it prohibits expressive nude dance performances in all settings under all circumstances throughout the State of Indiana.

ARGUMENT

I. NUDE DANCE ENTERTAINMENT IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT.

The question of whether nude dance entertainment is a protected form of expression under the First Amendment was addressed by this Court in *Schad v. Mt. Ephraim*, 452 U.S. 61 (1981). The Court reviewed a city zoning ordinance that prohibited all live entertainment. The petitioners were adult bookstore owners who challenged the zoning ordinance on overbreadth grounds. The bookstore establishment offered patrons the opportunity to view live nude dance entertainment under circumstances much like those involving petitioner Gayle Sutro. *See Glen Theatre, Inc. v. Civil City of South Bend*, 695 F. Supp. 414, 419 (N.D. Ind. 1988) (Findings of Fact, Appendix A).

In discussing the overbreadth issue, this Court declared that Mt. Ephraim's total ban on all live entertainment reached "non-obscene nude dancing that is otherwise protected by the First Amendment." *Schad*, 452 U.S. at 76. Necessarily central to the Court's overbreadth ruling was its finding that the ordinance infringed upon some form of protected speech or expression. The Court listed several forms of entertainment that were constitutionally protected *and expressly included nude dancing*. "[N]ude dancing is not without its First Amendment protections from official regulation." *Id.* at 66. The majority opinion concluded further that the municipality's interests in banning nude dance were entirely speculative; there was no justification on the record for excluding "even the nude dancing involved in this case." *Id.* at 73 n.15. Accordingly, the Court was not just concerned about the potential application of the ordinance to nudity in ballet; rather, the Court was convinced that the ordinance was unconstitutional in scope because it could be applied to nude "barroom" dancing, as petitioners have labeled the variety at issue here.

Earlier decisions from the Court, although perhaps less clear, support the same proposition. In *California v. LaRue*, 409 U.S. 109, 118 (1972), then-Justice Rehnquist, writing the majority opinion, recognized that "some of the performances to which these regulations addressed themselves [which included nude dance performances] are within the limits of the constitutional protection of freedom of expression. . . . " In *Doran v. Salem Inn*, 422 U.S. 922, 932 (1975), Justice Rehnquist declared that "[a]lthough the customary 'barroom' type of nude dancing may involve only the barest minimum of protected

expression, . . . this form of entertainment might be entitled to First and Fourteenth Amendment protection in some circumstances."

More recently, individual Justices have recognized the constitutionally protected nature of nude dance performances. Justice White, joined by Justice Brennan, dissented to a denial of certiorari in *Young v. Arkansas*, 474 U.S. 1070, 1072 (1985), stating that this Court had given "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment under some circumstances." Justices Marshall and Stevens joined Justice Brennan in dissent in *Massachusetts v. Oakes*, ___ U.S. ___, 109 S.Ct. 2633, 2642 (1989), and declared that *Schad* had afforded nude dancing protection under the First Amendment. Justice O'Connor, as part of a three-justice plurality in *FW/PBS, d/b/a Paris Adult Book Store II v. City of Dallas*, ___ U.S. ___, 110 S.Ct. 596, 604 (1990), noted that certain types of businesses are protected by the First Amendment, expressly including as an example the "nude dancing" business earlier reviewed in *Schad*.

Given the consistency of these declarations about the constitutionally protected character of nude dance entertainment, it is not surprising that numerous federal appellate courts and district courts have reached the same conclusion with specific references to nude barroom-type dancing. *See, e.g., International Food & Beverage System v. Fort Lauderdale*, 794 F.2d 1520, 1525 (11th Cir. 1986); *Leverett v. City of Pensacola*, 775 F.2d 1536, 1540 (11th Cir. 1985); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1058 (9th Cir. 1986); *BSA, Inc. v. King County*, 804

F.2d 1104, 1107 (9th Cir. 1986); *Walker v. City of Kansas City, Mo.*, 691 F. Supp. 1243, 1249 (W.D. Mo. 1988); *Doe v. City of Minneapolis*, 693 F. Supp. 774, 779 n.12 (D. Minn. 1988); *Function Junction, Inc. v. City of Daytona Beach*, 705 F. Supp. 544, 550 (M.D. Fla. 1987); *Tolbert v. City of Memphis, Tenn.*, 568 F. Supp. 1285, 1292-93 (W.D. Tenn. 1983); *Atwood v. Purcell*, 402 F. Supp. 231, 234 (D. Ariz. 1975).

Several state appellate courts have reached the same conclusion when interpreting the free speech provisions of their own constitutions. *E.g., Sekne v. City of Portland*, 81 Or. App. 630, 726 P.2d 959, 963 (1986); *Cabaret Entertainment v. Alcoholic Bev. Control Comm.*, 393 Mass. 13, 468 N.E.2d 612, 614 (1984); *Mickens v. City of Kodiak*, 640 P.2d 818, 820 (Alaska 1982); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151, 1155 (1978).

These pronouncements regarding the protected character of nude dance entertainment, germinate from the fairly self-evident observation that dance itself is a form of expression. The Seventh Circuit majority so noted: "Dance as entertainment is one of the earliest forms of expression known to man. . . . Inherently, it is the communication of emotions or ideas." *Miller v. Civil City of South Bend*, 904 F.2d at 1085. "[T]he basic appeal [of dance] remains the same – the transmission of a state of awe and excitement (whether exhilarating, emotionally moving or simply esthetic) from performer to spectator." Bland, *A History of Ballet and Dance in the Western World* at 11 (1976).

The recognition that dance is a form of expression, however, has not been limited to classical ballet, musical

theater dance, contemporary jazz dance, or other similar dance forms. Nudity and dance, combined to form nude dance performance, are recognized as legitimate, expressive traditions as well. Walter Sorrell, a noted dance historian, has stated:

> A mingling of the first major attack of anxiety with a newly experienced sensation of freedom led to a general trend toward nudity in the 1920's. Sometimes it can be a romantic gesture to show oneself in one's native beauty with emphasis on the body's movement,. . . . In 1929, in her revolutionary spirit, Helen Tamiris strongly believed in dance as the purest art form and experimented with the aesthetically valid notion that the dancer's body should communicate without the costumes. . . .
>
> A certain fascination with nudity in the twenties reappeared in the sixties. . . . It became a habitual sight on stage in plays and modern dance works.

Sorrell, *Dance In Its Time* at 425-428 (1981).

In contemporary American dance, Isadora Duncan is said to have led the way, being a great believer in nudity on stage. Cheshire, "Eroticism in the Performing Arts," in Webb (ed.), *The Erotic Arts* at 300-301 (1983). Duncan herself wrote:

> The noblest in art is the nude. This truth is recognized by all, and followed by painters, sculptors and poets; only the dancer has forgotten it, who should most remember it, as the instrument of her art is the human body itself.
>
> Man's first conception of beauty is gained from the form and symmetry of the human body. The new school of the dance should begin with that

> movement which is in harmony with and will develop the highest form of the human body.

Duncan, "The Art Of Dance", in Steinberg, *The Dance Anthology* at 38-39 (1980).

In the context of music hall or barroom entertainment, nudity combined with dance may have first gotten its start as part of the can-can. "This dance, most famous at the Folies Bergere, is said to have been the first dance to exploit nudity. . . . " Sobel, *A Pictorial History of Burlesque* at 41 (1956). Full nudity on stage appeared in the 1920's, when stage production numbers featured nude figures on chandeliers, as tassels on "living" curtains, and even as ingredients in a large fruit basket. In 1923 an additional step was taken in the production, "Artists And Models," where nude or semi-nude showgirls moved about on stage. Up until this time, nude figures had been permitted only if they were immobile. Laufe, *The Wicked Stage: The History of Theater Censorship and Harassment in the United States* at 47, 50 (1978). Later, with developments in burlesque and contemporary dance, nudity in dance has become a recognized entertainment form, with stylized costuming, distinctive musical accompaniments, and specific routines and dance techniques. *See generally*, Laufe, *supra*, at 19-107; Corio, *This Was Burlesque* at 8-78 (1968); and Zeidman, *The American Burlesque Show* at 136-160 (1967).

Common to these dance forms involving nudity and sexual suggestiveness is the communicative element. The very signs of communication that are found in ballet and contemporary dance (such as presentation before an

audience, musical accompaniment and stylized movement), are found, as well, though often in less sophisticated fashion, in nude dance performances.

The nudity itself is central to that communication. A majority of the Court of Appeals for the Seventh Circuit understood that communication and characterized it as "an emotional one; it is one of eroticism and sensuality." *Miller*, 904 F.2d at 1086-1087. Judge Cudahy agreed: "It is a message of temptation and allurement coupled with coy hints at satisfaction." *Id.* at 1089 (Cudahy, J., concurring). Judge Posner also concurred: "Erotic dances express erotic emotions, such as sexual excitement and longing." *Id.* at 1091 (Posner, J., concurring).

The presence of an audience is essential to this communication. Those in the audience are present not by compulsion or coincidence, but in anticipation of the emotional or sensual message. They pay to see the performers, to hear the music and to revel in the message – concrete evidence that nude or striptease dancing is an accepted form of expression.[1]

---

[1] In the past the audience was comprised mostly of men – from all stations of life. Justice Oliver Wendell Homes reportedly was a patron of the burlesque presented at the Gayety Theater in Washington, D.C. Corio, A., *This Was Burlesque* at 144.

Nude dance and striptease is no longer limited to women performers dancing before male audiences. The roles have been reversed in many entertainment clubs featuring male dancers and female audiences. *See* Smith, *Nudity, Obscenity and Pornography: The Streetcars Named Lust and Desire*, 4 J. of Contemp. Health L. and Policy 155, 161 (1988).

Another ingredient that adds to the expressive character of nude dance or striptease is the musical accompaniment. Judge Posner described the importance of music to nude dance: "[T]he dancing and the music are not distractions from the main theme, patched on to fool the censors; they are what make a given female body expressive of a specifically sexual emotion. Striptease is the ensemble of the music, the dance, the disrobing, and the nude end state. . . . " *Miller*, 904 F.2d at 1092 (Posner, J., concurring). The same relationship exists in other contemporary dance. "The relationship of dance to music is an intimate one. Music, through its pulse and rhythm, provides a driving force and an overall structure. . . . " Blom, *The Intimate Act Of Choreography* at 162 (1982).

Nude dance performances and striptease dances also have a choreography. Part of the emphasis can be traced to the choreography of the can-can: "The dance itself had a classic origin, its principal intention being to agitate some part of the female anatomy for the edification of the audience." Sobel, *supra*, at 40-41. Another stylized movement in striptease or nude dance is the "hootchy-kootchy", given notoriety by the famous dancer, Little Eqypt. "When she dances, every fiber and every tissue in her entire anatomy shakes. . . . " *Id.* at 57, 59.

> [The] appeal [of striptease] lies not only in the piquant suggestiveness of a female undressing knowingly while men are watching, but the gestures, winks and cooch movements – the modus operandi – that are essentially a part of it.

Zeidman, *supra*, at 136.

The striptease and nude dancing in this very case are but continuations of set routines.

> [T]he art of undressing became a ceremony with a special technique and nomenclature. The number itself was a combination of posing, strutting, dancing and singing punctuated from time to time by thrusts and twists of the abdomen called "bumps" and "grinds."

Sobel, *supra*, at 127.

To the extent that the nude dance performances of today incorporate improvisation, the routines still are expressive and communicative, just as improvised contemporary dance is.

> [Isadora Duncan] believed that dance should not be the repetition of ready-made steps. It should be free. It should express the feelings and ideas of human beings. It should forget its traditions and roam freely where it will, barefooted for the sake of control and in order to display the beauty of the foot, naked or near-naked to extol the body.

Marks, *A Pictorial History Of The Dance* at 93.

Respondents recognize that nude or semi-nude dancing does not appeal to everyone's sense of artistic expression or pleasure. Differences in artistic tastes, whether in dance, theater, music or food, and the allowance for such differences is one of the cornerstones of American democracy. Some people like ballet and caviar; in Georgia some people like clogging and cornbread. The latter is no less artistic for its simplicity or provincial nature.

Justice Harlan in *Cohen v. California*, 403 U.S. 15, 25 (1971), writing for a majority of the Court, spoke eloquently to this point:

> [I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely

> because governmental officials cannot make principled distinctions in this area that the constitution leaves matters of taste and style so largely to the individual.

Justice Harlan's point was reiterated in a nude dancing case, *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n.3 (2d Cir. 1974), *on remand*, 522 F.2d 1045, 1048 (2d Cir. 1975):

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal wants some "entertainment" with his beer or shot of rye.

Accordingly, while some will always argue that striptease and nude dance performances are tasteless or vulgar, the plain fact is that they are genuinely expressive, carrying many of the same attributes as other forms of dance.

II. THE PARTICULAR NUDE DANCE PERFORMANCES IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION.

Petitioners conceded from the very beginnings of these cases that the dance performances at issue were not obscene. *Glen Theatre v. Civil City of South Bend*, 726 F. Supp. 728, 731 n.3 (N.D. Ind. 1985). *See also, Miller v. Civil City of South Bend*, 887 F.2d 826, 829 n.3 (7th Cir. 1989).

Despite these concessions, the state argues that the performances by respondents Sutro, Miller and Johnson are not protected by the First Amendment because the performances have no expressive content and therefore

do not constitute "speech," relying on this Court's political speech cases. *See, e.g., United States v. Eichman*, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 109 S. Ct. 2533 (1989); *Spence v. Washington*, 418 U.S. 405 (1974); *Stromberg v. California*, 283 U.S. 539 (1931).

The footing for the State's entire argument, (that political speech criteria should be applied to dance entertainment or performances) is tenuous at best. First, none of the discussions regarding the protected nature of dance entertainment, and particularly nude dance, referred to such a compartmentalized constitutional test for separating conduct from speech. *E.g., Schad*, 452 U.S. at 66; *Doran*, 422 U.S. at 932-933; *La Rue*, 409 U.S. at 117. Instead, the Court has recognized the expressive nature of such performances as rather self-evident.

The dance performances described in *Doran* and *Schad* are virtually identical to the performances in this case. The expressive nature of the activity is so obvious, especially when it occurs on stage, that it becomes pointless to use the criteria that are more appropriately applied to political speech issues.

Recently, in *Ward v. Rock Against Racism*, ___ U.S. ___, 109 S. Ct. 2746 (1989), the Court applied First Amendment considerations to musical performances. "Music, as a form of expression and communication, is protected under the First Amendment." *Rock Against Racism*, 109 S. Ct. at 2753. To reach this conclusion the Court did not first resort to a three-part test, as derived by petitioners from *Texas v. Johnson*. (Pet. Brief, at 9). There was no assessment of whether the musical performances were characterized by any (1) intent to convey

(2) some particularized message with (3) a great likelihood that the message would be understood by listeners.

The petitioners' straight-jacket approach, in which all expressive conduct must pass each internal component of a political speech test, is both unworkable and absurd. For one, it was obvious from the rock concert setting in *Rock Against Racism* that the musical groups had an intent to communicate. On the other hand, it is doubtful that each musical performance conveyed a "particularized message."

The prospect of gauging constitutional protection for paintings, photography, drama, music or dance performances under the criteria discussed in *Texas v. Johnson* would be frightening to innumerable artists, playwrights, musical composers, and choreographers; for it is often the case that there is no "particularized message" to art or entertainment;[2] and even when there is an intended

---

[2] In the post-modern art of today many artists not only reject the idea of communicating a particular message, they even defy the notion that their work must have artistic value. Note, *Post-Modern Art and the Death of Obscenity Law*, 99 Yale L. J. 1359, 1365-1375 (1990).

Judge Posner, in his concurrence noted:

> The notion that all art worthy of the name has a "message" is Philistine, and leads to the weird conclusion that non-representational art and non-programmatic, non-vocal music are entitled to less protection under the First Amendment than striptease dancing because the latter has a more distinct, articulable message.

904 F.2d at 1094 (Posner, J., concurring).

theme or message, it is often lost on the audience. The audience, particularly in modern dance, often may not grasp the meaning. The premiere of Stravinsky's *Rite Of Spring (Le Sacre du Printemps)*, choreographed by Nijinsky, is a classic example. Sorrell, *supra*, at 370.

Nonetheless, if it is assumed that criteria such as those found in *Texas v. Johnson* form an appropriate measure for the expressive character and communicative content of the dance performances in this case, respondents' dance routines would pass the test. A majority on the Court of Appeals generally categorized respondents' routines as "non-obscene nude dancing of the barroom variety, performed as entertainment." *Miller*, 904 F.2d at 1028. Later, the majority opined that respondent's dances were "of inferior artistic and aesthetic quality as contrasted with a classic ballet such as the Dance of the Seven Veils in Strauss' *Salome*. . . . *Id.* at 1087. The Court found, however, that "the erotic message communicated to the viewers is present in both performances." *Id.* The majority also noted that while respondents' routines may lack a "scripted plot," the lack of such a story line is not determinative.

> The success of both the ballerina in an erotic production and the nude dancer in a barroom setting depend on the communication of their sensual message.

Id.

These descriptions of respondents' dance performances are accurate. Respondents' dance routines presented a dominant theme of "eroticism and sensuality." *Miller*, 904 F.2d at 1086-1087. Certainly there can be no doubt that dancers Sutro, Miller and Johnson intended

that message. The district court noted that Gayle Sutro is a professional actress and stripteaser, having studied acting, dancing, speech and language and having danced and acted professionally for more than 15 years. Sutro's affidavit stated that her nude dances were appropriately choreographed and were an attempt to communicate as well as to entertain. *Glen Theatre*, 695 F. Supp. at 420. While Darlene Miller described her routines in general terms, the videotape exhibits attest to the usual elements of dance including musical accompaniment, and the specific techniques of the striptease, described earlier. It is also apparent that both the majority and dissenting judges of the Seventh Circuit understood the message of these dances.

In sum, the nude dance routines in this case, which the State of Indiana would label as "public indecency," are protected forms of expression, both as a self-evident matter and under the criteria used by this Court in *Texas v. Johnson*.

III. INDIANA'S PUBLIC INDECENCY STATUTE CANNOT BE APPLIED CONSTITUTIONALLY TO THE PERFORMANCES IN THIS CASE.

The state argues in the alternative that if the performances in this case are constitutionally protected, Indiana's public indecency law still could be applied validly to those performances (Pet. 26).[3] The state advances three fall-back arguments.

First, the state claims that the statute is a law of general applicability and is "content-neutral" so that respondents' dance performances, even if expressive, are not entitled to constitutionally exempt status. Relying on *Baysinger*, the state is of the view that a nude dance performance that conveys only "an emotional theme" amounts to criminal conduct (Pet. Brief at 21), while a nude performance that is judged "to tell a story" or carry an "artistic message" is not (*id.* at 24). The state thus would condemn non-representational nude dance words as criminal. The dividing line between guilt and innocence, under the state's argument, would necessarily depend upon a prosecutor's or judge's subjective judgment that the questioned performance had some sort of

---

[3] The state's alternative position seems to contradict directly the holding in *State v. Baysinger*, 272 Ind. 236, 397 N.Ed.2d 580 (1979), *appeals dismissed sub nom., Clark v. State*, 446 U.S. 931 (1979) and *Dove v. State*, 449 U.S. 806 (1980). If this Court determines that the dance performances in this case constitute expressive activity protected under the First Amendment, the public indecency statute could not be constitutionally applied, according to *Baysinger*. 397 N.E.2d at 587.

story line or plot, as opposed to some non-representational subject. Yet these are obvious content-based distinctions.

The state's second argument in reserve is that the statute furthers a substantial governmental interest unrelated to the suppression of free expression. But the gloss placed upon the statute by *Baysinger* ties the operation of the statute directly to the suppression of a particular form of expression. Further, if the state supposes, for example, that there is a direct link between striptease or nude dance performances and prostitution, it failed to demonstrate how a prohibition extending from barroom to theater to bookstore settings would be tied directly to the regulation of prostitution. Instead, the breadth of the prohibition, as interpreted in *Baysinger*, betrays a governmental intent to censor erotica, not to control prostitution.

The state's third contention is that the statute's ban on nudity is a reasonable "manner" restriction, permissible under the Court's decisions that permit reasonable time, place and manner restrictions on protected expression. The flaw here is that the Indiana statute, just like the ordinance in *Doran*, prohibits expressive nude dance performances in all settings under all circumstances throughout the entire state, according to *Baysinger*. It is this operation of the statute, as construed, that noticeably separates it from those adult entertainment regulations otherwise approved by this court in *California v. LaRue*, 409 U.S. 109 (1972) and *Young v. American Mini Theatres*, 427 U.S. 50 (1976).

CONCLUSION

The nude dance performances in this case concededly are not obscene and are unquestionably communicative and expressive. Hence, they are entitled to First Amendment protection. The State of Indiana's attempts to suppress such expression because of the ideas and emotions conveyed, through a public indecency statute, should be rejected and the decision of the United States Court of Appeals for the Seventh Circuit should be affirmed.

Respectfully submitted,

JAMES A. WALRATH
SHELLOW, SHELLOW & GLYNN, S.C.
222 Each Mason Street
Milwaukee, Wisconsin 53202
(414) 271-8535

Counsel of Record for Amicus Curiae

December 14, 1990

No. 90-26

Supreme Court, U.S.
FILED
DEC 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, *et al.*,

Petitioners,

—v.—

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,

Respondents.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, INDIANA CIVIL LIBERTIES UNION, ACLU OF OHIO, AND VOLUNTEER LAWYERS FOR THE ARTS, IN SUPPORT OF RESPONDENTS

Spencer Neth
(*Counsel of Record*)
11075 East Boulevard
Cleveland, Ohio 44106
(216) 368-3297

Thomas D. Buckley, Jr.
1700 East 13 Street, #9VE
Cleveland, Ohio 44114
(216) 687-2309

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Nancy Adelson
Volunteer Lawyers for the Arts
1285 Avenue of the Americas
New York, New York 10019
(212) 977-9270

BEST AVAILABLE COPY

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI* 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 4

ARGUMENT 6

I. DANCE IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT 6

II. THE DANCE PERFORMANCES INVOLVED IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION 9

III. INDIANA'S BAN ON NUDE DANCING AS A FORM OF ENTERTAINMENT IS NOT CONTENT-NEUTRAL AND CANNOT BE UPHELD AS AN INCIDENTAL RESTRICTION ON SPEECH 14

IV. THE INDIANA STATUTE CHALLENGED IN THIS CASE IS NOT A TIME, PLACE, OR MANNER REGULATION 17

V. THE INDIANA STATUTE CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED AS A REGULATION OF ALCOHOLIC BEVERAGES 19

CONCLUSION 22

TABLE OF AUTHORITIES

Page

Cases

BSA, Inc. v. King County,
804 F.2d 1104 (9th Cir. 1096) 21

California v. LaRue,
409 U.S. 109 (1972) 8, 9, 19

Chase v. Davelaar,
645 F.2d 735 (9th Cir. 1981) 20

City of Lakewood v. Plain Dealer Publishing Co.,
486 U.S. 750 (1988) 14

City of Newport v. Iacobucci,
479 U.S. 92 (1986) 19

Clark v. Community for Creative Non-Violence,
468 U.S. 288 (1984) 10

Cohen v. California,
403 U.S. 15 (1970) 2, 14, 18

Commonwealth v. Sees,
373 N.E.2d 1151 (Mass. 1978) 14

Community for Creative Non-Violence v. Watt,
703 F.2d 586 (D.C.Cir. 1983),
aff'd on other grounds, 468 U.S. 288 (1984) 15

Consolidated Edison Co. v. Public Service Comm.,
447 U.S. 530 (1980) 17, 18

Dallas v. Stanglin,
490 U.S. ___, 109 S.Ct. 1591 (1989) 10

Page

Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975) 8, 9, 20

Dove v. Indiana,
449 U.S. 806 (1980) 4

Employment Division v. Smith,
494 U.S. ___, 110 S.Ct. 1595 (1990) 16, 17, 19

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975) 5, 7

FW/PBS, Inc., d/b/a Paris Adult Bookstore II v. City of Dallas,
493 U.S. ___, 110 S.Ct. 596 (1990) 8

Harper & Row Publishers, Inc. v. Nation Enterprises,
471 U.S. 539 (1985) 8

Jacobellis v. Ohio,
378 U.S. 184 (1964) 7

Jenkins v. Georgia,
418 U.S. 153 (1974) 7

Kolender v. Lawson,
461 U.S. 352 (1989) 14

Krueger v. Pensacola,
759 F.2d 851 (11th. Cir. 1985) 20

Morris v. Municipal Court,
652 P.2d 51 (Cal.Sup.Ct. 1982) 20

New York State Liquor Auth. v. Bellanca,
452 U.S. 714 (1980) 21

Sable Communications v. FCC,
492 U.S. ___, 109 S.Ct. 2829 (1989) 18

Salem Inn, Inc. v. Frank,
501 F.2d 18 (2d Cir.),
aff'd in part sub nom.
Doran v. Salem Inn, Inc.,
422 U.S. 922 (1975) 13, 20

Schacht v. United States,
398 U.S. 58 (1970) 6

Schad v. Borough of Mount Ephraim,
452 U.S. 61 (1981) 7, 8

Southeastern Promotions v. Conrad,
420 U.S. 546 (1975) 7

Spence v. Washington,
418 U.S. 405 (1974) 9

State v. Baysinger,
397 N.E.2d 580 (Ind.Sup.Ct. 1979),
appeal dismissed, 446 U.S. 931 (1980) 2, 4

Stromberg v. California,
283 U.S. 359 (1931) 6

Texas v. Johnson,
491 U.S. ___, 109 S.Ct. 2533 (1989) 6, 9, 10, 15, 16

Tinker v. Des Moines
Independent School District,
393 U.S. 503 (1969) 6

U.S. v. Eichman,
496 U.S. ___, 110 S.Ct. 2404 (1990) 6, 15, 16

United States v. O'Brien,
391 U.S. 367 (1968) 15, 16

Ward v. Rock Against Racism,
491 U.S. ___, 109 S.Ct. 2746 (1989) 7, 10, 18

Whitney v. California,
274 U.S. 357 (1927) 16

Zacchini v. Scripps-Howard Broadcasting Co.,
433 U.S. 562 (1977) 7

Statutes and Regulations

17 U.S.C. §101, *et seq.* 8

Ind. Code §35-45-4-1 ..... 2, 4

Other Authorities

Dunn, Judith, "We Don't Talk
About It. We Engage In It," in
Brown, *The Vision of Modern Dance* (1979) 12

Nimmer, "The Meaning of Symbolic Speech
Under the First Amendment,"
21 U.C.L.A. L.Rev. 29 (1973) 7

Note, "First Amendment Protection of
Ambiguous Conduct,"
84 Col.L.Rev. 467 (1984) 10

Sacks, Oliver, *Seeing Voices* (1989) 6

Sparshott, Francis, *Off The Ground,*
First Steps to a Philosophical
Consideration of Dance (1988) 11, 12

INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, nonprofit organization with over 275,000 members dedicated to preserving the principles embodied in the Bill of Rights. The Indiana Civil Liberties Union and the ACLU of Ohio are both statewide affiliates of the national organization. The Indiana Civil Liberties Union has a particular interest in this case because it arises in Indiana and concerns the application of an Indiana statute. The ACLU of Ohio has a particular interest in this case because lawyers associated with the Ohio affiliate represent the petitioner in *Rosenberg v. City of Lorain*, 90-341, *petition for cert. filed* (Aug. 21, 1990), which raises issues similar to the issues raised by this case.

Those issues involve fundamental questions of free speech and symbolic expression that are central to the ACLU. As an organization that litigates hundreds of free speech cases every year, the ACLU is especially concerned by any attempt to misapply or dilute essential First Amendment standards that properly limit the government's ability to regulate speech.

Volunteer Lawyers for the Arts (VLA) is a New York nonprofit organization which provides free art-related legal assistance to artists and arts organizations otherwise unable to afford such services. VLA's clients include dancers, choreographers, nonprofit dance and theatre companies, musicians, visual artists and dramatists. The right to express oneself through nonverbal, nontraditional means is a cornerstone of artistic freedom. Therefore, VLA shares its clients' fears that Indiana's position in this case, if adopted, would seriously erode essential First Amendment protection of all nonverbal forms of artistic expression.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

STATEMENT OF THE CASE

Amici do not intend to repeat the statement of facts set forth by the parties. For purposes of this brief, it is sufficient to note that this case involves the constitutionality of an Indiana misdemeanor statute that bans public nudity,[2] and that has been applied by Indiana officials to prohibit nude dancing as a form of adult entertainment. *State v. Baysinger*, 397 N.E.2d 580 (Ind.Sup.Ct. 1979), *appeal dismissed*, 446 U.S. 931 (1980). On its face, the statute prohibits all nude dancing. However, as construed by the Indiana Supreme Court, the statute's prohibitory language does not extend to nude dancing "having an expressive character." *See Miller v. Civil City of South Bend*, 904 F.2d 1081, 1090 (7th Cir. 1990)(*en banc*) (Posner, J., concurring).

The petitioners in this case include two adult establishments that wish to present nude dancing and several dancers who wish to perform in the nude. One of the establishments servers liquor, the other does not. *Id.* at 1082. Thus, despite the repeated record references to "barroom" type dancing, this case does not turn on the state's ability to regulate the sale of liquor. Nor does this case involve obscenity. Indeed, the state has conceded that the dancing at issue is not obscene under this Court's definition. *Id.*

Thus, the only issue presented to this Court, and the only issue addressed by the court below, is "whether non-obscene nude dancing of the barroom variety, performed as entertainment, is expression and thus entitled to protection under the First Amendment." *Id.* Quoting Justice Harlan's words in *Cohen v. California*, 403 U.S. 15, 25 (1970), a majority of the Seventh Circuit, sitting *en banc*, concluded that "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." 904 F.2d at 1086.

In a lengthy concurring opinion, Judge Posner considered a series of arguments that the state could have (but did not) make in defense of the statute. *Id.* at 1100. First, he surveyed the long history of erotic dance in western culture. *Id.* at 1089-90. Second, he rejected the notion that erotic art appealed to the emotions rather than the intellect and, therefore, was somehow nonexpressive in First Amendment terms. *Id.* at 1093-96. Third, he dismissed the argument that First Amendment protection can or should turn on the sophistication of the performance. *Id.* at 1098. Finally, he pointed out that the statute could not be upheld as an "incidental" restriction on speech because "[t]he defendants have not attempted to defend the district court's decision on th[at] ground . . . ." *Id.* at 1103.

The dissent by Judge Coffey emphasized the state's interest in promoting public morality. "I am not one of those," he wrote, "who believes that it is the role of the federal courts through the creation of a 'living constitution,' to, in effect, establish a secular moral view that contributes to the piece-by-piece dismantling of our historic Judeo-Christian principles and heritage." *Id.* at 1106. Judge Easterbrook's dissent focused less on the state interest than on the underlying value of the nude dancing at issue. Failing to find any communicative message worth respecting, he concluded that "[b]arroom displays are to ballet as white noise is to music." *Id.* at 1126.[3]

---

[2] The challenged law makes it a crime to "knowingly or intentionally, in a public place . . . appear[] in a state of nudity." Ind. Code §35-45-4-1. Respondents have conceded that the adult establishments they operate are "public place[s]" under Indiana law. *Miller v. City of South Bend*, 904 F.2d 1081, 1082 (7th Cir. 1990)(*en banc*).

[3] A third dissent, written by Judge Manion, largely synthesized the views of the other two dissenters. 904 F.2d at 1131-35.

SUMMARY OF ARGUMENT

This case involves an attempt by petitioners to censor the form and content of respondents' dance performance. According to petitioners, this censorship can be accomplished by applying the Indiana public indecency statute, Ind. Code §35-45-4-1, to an erotic dance act performed for consenting adults in an enclosed place of entertainment.

Although petitioners repeatedly refer to this case as one involving "barroom dancing," the performances relating to respondent Glen Theatre, Inc. were in an establishment called "The Chippewa Bookstore," which does not serve alcoholic beverages. The performances which petitioners sought to censor in the case of the other respondents were in establishments that serve alcoholic beverages, but the Indiana statute, on its face and as interpreted by the Indiana Supreme Court, applies to performances in any public place, whether that place be a bar, a bookstore, a theatre, a university classroom, a fashion house or a public street. *See State v. Baysinger*, 397 N.E.2d 580; *Dove v. Indiana*, 449 U.S. 806 (1980).

Amici do not dispute the state's right to regulate some forms of public nudity. For example, we assume it would be constitutionally unobjectionable for Indiana to apply its public indecency statute to an uninvited nudist on a public beach, or to an exhibitionist exposing himself on a public street. This case, however, does not involve a facial challenge to the Indiana statute but rather a challenge to the constitutionality of the statute as applied to nude dancing offered as entertainment to consenting adults. In that context, we agree with Judge Posner's concurring opinion below. Specifically, we do not believe that the statute can be applied on the facts of this case without offending First Amendment norms that this Court has established in a series of decisions over many years.

Petitioners attempt to obscure that fact by raising a number of issues that we do not believe are properly presented by this record. This is not a case about the regulation of liquor; it is not a case about the regulation of obscenity; it is not a case about the time, place or manner of expression; and it is not a case about "the kind of public nudity traditionally subject to indecent-exposure laws," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 n.7 (1975). It is a case about the state's effort to suppress a form of expression because of the message it conveys. In resisting that effort, the majority below cannot be accused of trivializing the First Amendment. To the contrary, the decision below properly recognizes that core First Amendment values are often most jeopardized when they arise in unconventional settings.

Dance is clearly a form of expression, just as music, painting, sculpture, theatre, and literature. Accordingly, a dance performed before a live audience is just as entitled to First Amendment protection as the performance of a play, an instrumental music work, or the exhibition of a motion picture. Characterizing the dance performances in this case as conduct rather than speech may achieve the state's goal but the First Amendment cost is unacceptably high. Indeed, the narrow definition of "speech" proposed by petitioners would largely eviscerate the First Amendment protection that this Court has appropriately bestowed on artistic expression.

Respondents' dance may not be high art but it is expression and, as expression, it may not be suppressed because of the message it conveys. Petitioners' disapproval of that message is irrelevant under the First Amendment. Moreover, the First Amendment problem does not disappear merely because petitioners claim the right to determine whether respondents' performance conveys any message at all. In the first place, it seems undeniable that nude dancing conveys an erotic message that is clearly intended by its performers, and just as

clearly understood by the audience that chooses to attend. Beyond that truism, however, a statute that permits and encourages the police to arrest performers based on whether the performance conveys a message that can be articulated verbally poses the same risk of arbitrary or discriminatory law enforcement that this Court has repeatedly condemned.

ARGUMENT

I. DANCE IS A FORM OF EXPRESSION PROTECTED BY THE FIRST AMENDMENT

The First Amendment is written in terms of "freedom of speech." However, it has long been clear that "speech," in the First Amendment sense, is not limited to words. Much of the most important communication takes a form other than words. The deaf, who commonly communicate by means of a sign language that involves no words, are surely entitled to fully participate in the public dialogue of our nation. Oliver Sacks, *Seeing Voices* (1989). Political ideas and ideals are frequently expressed by sign or symbol devoid of words, and these nonverbal forms of expression have been fully recognized as entitled to First Amendment protection. As early as 1931 this Court held the display of a red flag to be protected "speech," *Stromberg v. California*, 283 U.S. 359 (1931), and more recently this Court held the burning of a flag to be expression protected by the First Amendment. *U.S. v. Eichman*, 496 U.S. ___, 110 S.Ct. 2404 (1990); *Texas v. Johnson*, 491 U.S. ___, 109 S.Ct. 2533 (1989). Other examples include the arm bands protected in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), and the wearing of a uniform in *Schacht v. United States*, 398 U.S. 58 (1970).

Likewise, this Court has repeatedly held that the freedom of expression protected by the First Amendment is not limited to the expression of political views.

Motion pictures have long been recognized as protected forms of expression without regard to any political content or social commentary. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Erznoznik v. City of Jacksonville*, 422 U.S. 205. Live drama is similarly and without question within the scope of the First Amendment. *Southeastern Promotions v. Conrad*, 420 U.S. 546 (1975). In none of these cases was there any inquiry into the substantive content of the expression, or indeed into whether the performance communicated anything in particular.

Performances necessarily involve communication, or at least an attempt to communicate, and this Court has never required that what is communicated must be political or intellectual. Indeed, as this Court stated in *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977), "entertainment, as well as news, enjoys First Amendment protection." 433 U.S. at 578. Thus, this Court had little difficulty concluding in its only other case to deal squarely with the nude dancing issue that "[e]ntertainment, as well as political and ideological speech, is protected . . . ." *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 65 (1981).

These principles were most recently reaffirmed in *Ward v. Rock Against Racism*, 491 U.S. ___, 109 S.Ct. 2746 (1989), which applied First Amendment standards to an outdoor rock music performance. In explaining its conclusion, the Court observed: "Music, as a form of expression and communication, is protected under the First Amendment." 109 S. Ct. at 2753. That result is fully consistent with established First Amendment doctrine. Indeed, as one respected commentator has written, "[i]t would be shocking to conclude that symphonic compositions or nonrepresentational art could be the subject of governmental censorship. Both are fully within the ambit of the First Amendment notwithstanding their lack of both verbal and cognitive content." Nimmer, "The

Meaning of Symbolic Speech Under the First Amendment," 21 U.C.L.A. L.Rev. 29, 35 (1973).

There is nothing in principle, policy or constitutional theory that distinguishes dance from other forms of expression protected by the First Amendment. As the court below has extensively demonstrated, dance performances have long been an important mode of expressing and communicating a wide variety of ideas and emotions.[4] In recognition of that fact, this Court has acknowledged that dance is entitled to First Amendment protection on at least three separate occasions. *See California v. LaRue*, 409 U.S. 109, 118 (1972); *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975); *Schad v. Borough of Mt. Ephraim*, 452 U.S. at 65. Moreover, all three of these decisions involve dance performances similar to those involved in this case.[5]

For that reason, perhaps, petitioners wisely concede that "some forms of dance are communicative." Petitioners' Brief at 21. Implicit in that concession is the recognition that the most basic human emotions are often best expressed in nonverbal form precisely because they

---

[4] It is worth noting that all forms of dance -- including nude dancing -- are subject to copyright protection under the federal copyright statute. 17 U.S.C. §101, *et seq*. That statute -- itself derived from a constitutional provision, Art. I, Sec. 8, cl. 8 -- refers to dance as a form of "expression." It extends protection to "original works of authorship fixed in any *tangible medium of expression*," explicitly including "choreographic works." 17 U.S.C. §102(a)(4). The direct relationship between copyrightable expression such as dance and the First Amendment has been drawn by this Court: ". . . it should not be forgotten that the Framers intended copyright itself to be the engine of free expression." *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 558 (1985). It follows that copyrightable choreographic works are, too, "engines of free expression" which must be protected under the First Amendment.

[5] In addition, *FW/PBS, Inc., d/b/a Paris Adult Bookstore II v. City of Dallas*, 493 U.S. ___, 110 S.Ct. 596 (1990), involved, in part, the regulation of establishments providing live nude dancing.

are so basic and thus frequently difficult to verbalize. Nevertheless, petitioners suggest that unless a message has intellectual content and can be verbalized, its nonverbal expression is not entitled to First Amendment protection. That position has no support in logic or First Amendment doctrine. It also has very little relevance to what this case is really about, which is content-based censorship.

II. THE DANCE PERFORMANCES INVOLVED IN THIS CASE ARE ENTITLED TO FIRST AMENDMENT PROTECTION

Given their concession that some forms of dance are "communicative," petitioners are reduced to arguing that the dance performances in this case do not trigger First Amendment scrutiny because they do not convey any message that the state is either willing or able to recognize. At the outset, this proposition is difficult to reconcile with *LaRue*, *Schad*, and *Doran*, where similar dance performances were analyzed in First Amendment terms. It is also unsupported by the symbolic speech cases on which petitioners rely. Indeed, petitioners' reliance on the symbolic speech cases is misplaced for at least two reasons. First, this is not a case about symbolic speech. Second, the facts of this case easily fit within the symbolic speech test that the Court has articulated.

As petitioners correctly note, the critical inquiry in symbolic speech cases is whether conduct that is not inherently expressive is nonetheless intended under the particular circumstances to convey a particularized message, and whether that message is likely to be understood by the relevant audience. *Texas v. Johnson*, 109 S.Ct. at 2539; *Spence v. Washington*, 418 U.S. 405, 410-11 (1974). Petitioners then argue that the nude dancing at issue in this case does not meet those criteria.

What petitioners overlook, however, is that the sym-

bolic speech doctrine has never been applied to activity, like a dance performance, that is expressive by its very nature.[6] Rather, it was developed as a way of determining whether conduct that is not normally expressive may nonetheless be expressive, and entitled to constitutional protection, in particular circumstances. *See* Note, "First Amendment Protection of Ambiguous Conduct," 84 Col. L.Rev. 467 (1984). In cases where the conduct at issue is not naturally associated with communication, such as sleeping in a park, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), or flagburning, *Texas v. Johnson*, 109 S.Ct. 2533, a court must necessarily have some means of deciding if the conduct is merely conduct or if it is symbolic expression.

This case, by contrast, involves dancing in front of an audience. If nothing else, the presence of an audience testifies to the fact of communication. Indeed, there is no reason for the audience to be there unless something is being communicated by the performer and thus there is none of the communicative ambiguity that normally triggers the symbolic speech test. The dancers in this case were performing an act for the benefit of their audience. Whatever one thinks about that performance, it is readily distinguishable from a person strolling nude in a public park. It was, quite clearly, a show that was meant to have impact upon the feelings and thoughts of those in the audience assembled for just that purpose. And, as Judge Posner noted in his concurrence below, "the expression that is relevant to freedom of speech . . . is the expression of thought, sensation, or emotion *to another person*." 904 F.2d at 1092 (emphasis in original).

Thus, for example, this Court did not use the language of symbolic speech in analyzing the rock music concert in *Ward v. Rock Against Racism*, 109 S.Ct. 2746. There, as here, there was no need to look for an intent to communicate -- that was obvious from the context. Nor did the Court engage in a belabored search for articulable meaning. Music seldom has anything one could call a "particularized message," and yet it is obvious that music is an important medium of communication among people. Even petitioners would presumably not argue that a public official could censor a Wagner overture unless the conductor could prove that both composer and orchestra intended and succeeded in conveying a "particularized message."

In any event, it is clear that the facts of this case meet the symbolic speech test, whether or not it applies. Most fundamentally, petitioners' claim that the dancers in this case did not intend to convey any message is simply inconsistent with the record. For example, respondent Gayle Ann Marie Sutro, a well-schooled professional dancer and actress, explicitly states in her affidavit that her "nude dance performances are appropriately choreographed and are an attempt to communicate as well as entertain." *See* Brief in Opposition to Petition, at App.4.[7]

---

[6] *Cf. Dallas v. Stanglin*, 490 U.S. ___, 109 S.Ct. 1591 (1989)(strict scrutiny does not apply to social dancing by minors that is unrelated to any performance).

[7] Nudity in dance is hardly unique to barrooms and, as Judge Posner's concurring opinion demonstrates, has a long history. 904 F.2d at 1089-90.

> Near-nakedness is common in dance, and not necessarily in connection with sexual stripping or to free the limbs for movement (or for the perception of movement). Public nakedness is special and is a direct way of marking the specialness of the dancer. And acts of dressing or of undressing may be incorporated into dances with a variety of social, sexual, aesthetic, or other meanings.

Francis Sparshott, *Off The Ground, First Steps to a Philosophical Con-*

(continued...)

Even if the record were less clear, however, a dancer's inability to articulate his or her message in words does not necessarily mean that there was no communication intended or that no communication resulted from the performance. Dancers communicate by their dance, not by words, and like most artists, they may frequently be able to communicate effectively only through their art. As Judith Dunn, an important American dancer and teacher of dance, has stated: "Artists for the most part don't think abstractly about communication." The title of Ms. Dunn's essay is even more to the point: "We Don't Talk About It. We Engage In It."[8]

Whether or not articulated or even articulable, the dances in this case plainly did have a message, and that message was readily understandable. As described in Judge Flaum's opinion below, "[t]he dominant theme communicated here by the dancers is an emotional one; it is one of eroticism and sensuality," 904 F.2d at 1087. Or, as Judge Cudahy described it in his concurring opinion below, it is "a message of temptation and allurement coupled with coy hints at satisfaction." *Id.* at 1089. Judge Posner's concurring opinion gives a more extended but similar description of the message. *Id.* at 1091-92.

Some might find this message distasteful and vulgar, but the Constitution does not permit public officials to

---

[7] (...continued)
sideration of Dance 179 (1988).

As Sparshott further notes:

> [N]akedness is charged with special meanings. One of these is sexuality; the naked body is, often, the sexually offered and prepared body. Insofar as that is so, naked dance may be inherently erotic . . . .

Id. at 368.

[8] Dunn's essay appears in Brown, *The Vision of Modern Dance* (1979).

censor a performance on the basis of content of the message, or the artistic quality of the performance conveying that message. Petitioners' problem here is not that there is no message, but that they do not like the message being sent and therefore seek to censor it.

Finally, petitioners attempt to denigrate the dancers and their performance by asserting it is not art, or at least not "good" art, and thus not worthy of constitutional protection. This Court should be wary of making such distinctions or enshrining them in constitutional doctrine:

> [W]hile the entertainment afforded by a nude ballet at Lincoln Center to those who can pay the price may differ vastly in content (as viewed by judges) or in quality (as viewed by critics), it may not differ in substance from the dance viewed by the person who, having worked overtime for the necessary wherewithal, wants some "entertainment" with his beer or shot of rye.

Salem Inn, Inc. v. Frank, 501 F.2d 18, 21 n.3 (2d Cir.), *aff'd in part sub nom. Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).[9]

Outside the obscenity context, there is no basis in

---

[9] Judge Cudahy made a similar point in his concurring opinion below.

> I hasten to add . . . that I do not think it appropriate to make fine distinctions between the favored entertainments of "Joe Sixpack" and those of "Mrs. Gotrocks." As the majority notes, the Free Speech Clause, by protecting the freedom of expression, necessarily leaves matters of expression and style to the individual.

904 F.2d at 1089 n.1.

constitutional law for permitting public officials to censor a dance performance based on their idiosyncratic judgments about what is or is not art, or what is or is not worthwhile. *See Commonwealth v. Sees*, 373 N.E.2d 1151, 1155 (Mass. 1978)(neither courts nor police are competent to serve as "artistic constables"). Moreover, granting public officials the discretion that petitioners seek in this case would create the very risk of arbitrary or discriminatory law enforcement that this Court has repeatedly condemned when reviewing vague criminal laws, *e.g.*, *Kolender v. Lawson*, 461 U.S. 352 (1989); and standardless licensing schemes, *e.g.*, *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

As Justice Harlan stated so eloquently and so simply: "[W]e think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. at 25.

III. INDIANA'S BAN ON NUDE DANCING AS A FORM OF ENTERTAINMENT IS NOT CONTENT-NEUTRAL AND CANNOT BE UPHELD AS AN INCIDENTAL RESTRICTION ON SPEECH

Petitioners attempt to justify the application of Indiana's public indecency statute to respondents' dancing by arguing that it is a "content-neutral criminal prohibition of conduct." Petitioners' Brief at 32. Properly understood, however, the statute is neither content-neutral nor addressed to conduct, at least as applied to the facts of this case.

Indiana has not banned dancing, it has banned nude dancing. It has not banned all nude dancing, it has banned only nude dancing that it regards as nonexpressive. And it has determined what is nonexpressive largely by disparaging as worthless the message that respondents seek to convey. Petitioners argue as though the selectivity of their ban establishes its constitutionality. In fact, just the opposite is true. As then-Judge Scalia wrote in another context, the First Amendment "would not invalidate a law generally prohibiting the extension of limbs from the windows of moving vehicles; it would invalidate a law prohibiting only the extension of clenched fists." *Community for Creative Non-Violence v. Watt*, 703 F.2d 586, 623 (D.C.Cir. 1983)(Scalia, J., dissenting), *aff'd on other grounds*, 468 U.S. 288 (1984). Here, it is an exposed breast rather than a clenched fist, but the point is the same.

Petitioners argue that the state's interest in this case is unrelated to expression and should therefore be judged by the lower standard of *United States v. O'Brien*, 391 U.S. 367 (1968). This Court's recent decisions in the flagburning cases are sufficient to answer that contention. *See United States v. Eichman*, 110 S.Ct. at 2408; *Texas v. Johnson*, 109 S.Ct. at 2542. Like the flagburning cases, the state's interest in this case is inextricably tied to the message it perceives in respondents' nude dancing. Thus, petitioners now argue that the ban on nude dancing is designed to promote public morality and discourage both adultery and divorce. *See* Petitioners' Brief at 31. Even under the state's theory, however, the ban on nude dancing would not make any sense unless respondents' nude dancing was readily understood as conveying a contrary message. Whether one agrees or not with petitioners' perception of nude dancing, it is plainly inconsistent with the claim of content-neutrality and, indeed, with petitioners' more general contention that respondents' nude dancing conveys no message at all. Under these circumstances, *O'Brien* does not apply and strict scrutiny is required.[10]

---

[10] Faced with an analogous claim in *Texas v. Johnson*, the Court (continued...)

This is not to suggest that the state has no interest in public morality or adultery or divorce. To the contrary, *amici* readily concede that the state's interest in those subjects is sincere and legitimate. But even legitimate state interests cannot be pursued by suppressing expression. There are countries in the world that take a very different view and use the power of law to enforce a strict moral code. They are not countries, however, that share our constitutional tradition or our First Amendment. In our country, the answer to speech remains what it has always been, more speech. *See Whitney v. California*, 274 U.S. 357, 377 (1927)(Brandeis, J., concurring). The desire to promote the majority's sense of morality, however well intended, does not permit state officials to censor the clothing and movements of actors and dancers.

Petitioners' reliance on *Employment Division v. Smith*, 494 U.S. ___, 110 S.Ct. 1595 (1990), is equally unpersuasive. As petitioners acknowledge, and as the Court's decision clearly states, *Smith* involved "a free

---

[10] (...continued)
wrote:

> The State, apparently, is concerned that [flagburning] will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of *O'Brien*. We are thus outside of O'Brien's test altogether.

109 S.Ct. at 2542. *See also United States v. Eichman*, 110 S.Ct. at 2408.

exercise claim unconnected with any communicative activity . . . ." 110 S.Ct. at 1602. This case, by contrast, is all about communicative activity. *Smith* also involved a generally applicable statute prohibiting peyote use regardless of its religious purpose. In this case, the state has already created an exception for expressive conduct that undermines any claimed interest in uniformity. *See* p.2, *supra*.

Finally, the decision in *Smith* was carefully confined to free exercise claims. If it has any relevance here, it supports respondents' position, for as the *Smith* Court noted:

> The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press.

110 S.Ct. at 1601. It is precisely those freedoms that are at stake here.

IV. THE INDIANA STATUTE CHALLENGED IN THIS CASE IS NOT A TIME, PLACE, OR MANNER REGULATION

In another failed attempt to avoid the strict prohibitions against content-based censorship, petitioners attempt to characterize the Indiana statute as a mere time, place, or manner regulation. The characterization is inaccurate on several grounds. A valid time, place, or manner regulation must be content-neutral. *E.g., Consolidated Edison Co. v. Public Service Comm.*, 447 U.S. 530,

536 (1980). As previously discussed, this statute fails that test when applied to the facts of this case. *See* Point III, *supra*. In addition, petitioners' position in this case, if adopted by the Court, would prohibit respondents' dance performance anywhere in Indiana. Such a total ban cannot plausibly be described as a mere regulation of the time, place, or manner of expression. In short, respondents have not been left with "ample alternative channels for communication." *Id*. at 535. Instead, they have effectively been told that they cannot communicate at all in their chosen medium.

Petitioners' response to this argument rests on the claim that Indiana is not abridging respondents' right to dance; rather, petitioners argue, the state is simply addressing the "manner" in which respondents' dance can take place. Again, the fallacies in petitioners' argument are readily apparent. If language and meaning are inseparable, as this Court recognized in *Cohen v. California*, 403 U.S. at 25-26, then it is even more clearly true that the message of art cannot be separated from its medium.

Petitioners' reliance on *Ward v. Rock Against Racism*, 109 S.Ct. 2746, is similarly misplaced. As petitioners point out, the decision in *Ward* upheld New York City's right to regulate the sound at a rock music performance in Central Park. Unlike *Ward*, however, the restriction here amounts to a total ban. And unlike this case, the performance in *Ward* had impact upon persons who were not part of the intended audience. No such impact is present or established in this case. The only persons affected by respondents' dance performances were those who chose to enter respondents' premises and observe the performances. This selfselected audience is not seeking any protection from the state, and the state's paternalistic desire to provide its unsought protection is unconstitutional. *See Sable Communications v. FCC*, 492 U.S. ___, 109 S.Ct. 2829

(1989)(federal government may not outlaw "indecent" but not "obscene" telephone services).

Finally, petitioners' contention that the Indiana statute only imposes a modest restriction on respondents' performance underestimates the significance of the legal issues in this case. The same arguments that petitioners make here could justify a statute requiring that all dancers performing in the State of Indiana must be fully clothed from head to foot. Petitioners' assertion that "any alleged 'erotic message' of the barroom dancer can be communicated just as effectively in scanty apparel as in total nudity," Petitioners' Brief at 40, is both debatable and irrelevant. The record of this case is ample proof that respondents believe otherwise. More fundamentally, it is not the role of the state to determine what dancers, artists or musicians require to communicate their art. Under the First Amendment, such judgments can only be made by the individuals involved and not by the state. *Cf. Employment Division v. Smith*, 110 S.Ct. at 1604 (the Constitution does not allow state officials to weigh the "importance" of ideas).

V. THE INDIANA STATUTE CHALLENGED IN THIS CASE CANNOT BE JUSTIFIED AS A REGULATION OF ALCOHOLIC BEVERAGES

Although not argued in this Court by petitioners, two of the dissenting opinions below suggested that the Indiana statute might be constitutionally applied to dance performances in a state-licensed bar serving alcohol.[11] *See* 904 F.2d at 1115 n.8 (Judge Coffey); 904 F.2d at 1134 n.6 (Judges Manion, Coffey and Easterbrook). It is true that this Court has held that the states, acting

---

[11] The present case involves two adult establishments; one serves liquor, the other doesn't. *See* p.2, *supra*.

pursuant to the Twenty-First Amendment, may restrict nude dancing in bars that serve alcohol. *California v. LaRue*, 409 U.S. 109; *City of Newport v. Iacobucci*, 479 U.S. 92 (1986). However, this is true only if the state is acting in its role as regulator of the sale and consumption of intoxicating beverages. *See Doran v. Salem Inn, Inc.*, 422 U.S. 922 (upholding state's authority to ban nude dancing as a part of its liquor license program).

When the state acts as a general censor, and not as a part of its authority to regulate the complex of problems created by the presence of intoxicating substances, its powers are more circumscribed. On that basis, numerous lower court decisions have struck down local laws banning nude dance performances, even when those performances took place in establishments serving liquor. *E.g., Krueger v. Pensacola*, 759 F.2d 851 (11th. Cir. 1985); *Chase v. Davelaar*, 645 F.2d 735 (9th Cir. 1981); *Salem Inn, Inc. v. Frank*, 522 F.2d 1045; *Morris v. Municipal Court*, 652 P.2d 51 (Cal.Sup.Ct. 1982).

That is precisely the situation here. Indiana's elected representatives have never considered whether mixing alcohol and nude dancing justifies the statute in question. The history of the Indiana public indecency statute involved in this case predates the Twenty-First Amendment and could not have been a knowing exercise of the authority granted under that Amendment. Whether the Indiana legislature would now decide to exercise its powers under that Amendment to ban dance performances such as that involved here is unknown and unknowable.

In upholding a New York State law banning topless dancing in bars, this Court explained:

> [T]he elected representatives of the State of New York have chosen to avoid the disturbances associated with mixing alcohol and nude dancing by means of a reasonable restriction upon establishments which sell liquor for on-premises consumption . . . Whatever artistic or communicative value may attach to topless dancing is overcome by the State's exercise of its broad powers arising under the Twenty-first Amendment. Although some may quarrel with the wisdom of such legislation and may consider topless dancing a harmless diversion, the Twenty-first Amendment makes that policy judgment for the state legislature, not the courts.

New York State Liquor Auth. v. Bellanca, 452 U.S. 714, 718 (1980).

Here, that policy judgment has never been made. A decision by this Court upholding application of the Indiana statute to establishments that are licensed to sell liquor, while striking it down in other contexts, would produce a result that the Indiana legislature never contemplated and might not desire. If establishments that are not licensed to sell liquor are free from the censorship of the statute, Indiana might find itself with adult juice bars that have nude dancing but do not serve liquor, and which are therefore not subject to zoning or laws regulating liquor licensees. *See, e.g., BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1096). While this may or may not be acceptable to the people of Indiana, it is a judgment that the Indiana people should make through their elected representatives, not by rewriting a statute without any clear indication of legislative intent.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

Spencer Neth
(*Counsel of Record*)
11075 East Boulevard
Cleveland, Ohio 44106
(216) 368-3297

Thomas D. Buckley, Jr.
1700 East 13 Street, #9VE
Cleveland, Ohio 44114
(216) 687-2309

Steven R. Shapiro
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Of Counsel:

Nancy Adelson
Volunteer Lawyers for
the Arts
1285 Avenue of the Americas
New York, New York 10019
(212) 977-9270

Dated: December 14, 1990

(16)

No. 90-26

FILED
DEC 17 1990
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE COALITION FOR FREEDOM OF EXPRESSION, AND THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

Of Counsel:

ELLIOT M. MINCBERG
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

STEPHEN F. ROHDE
THE COALITION FOR FREEDOM OF EXPRESSION
1880 Century Park East
Los Angeles, CA 90067
(213) 277-1482

MARY D. DORMAN
THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION
568 Broadway
New York, NY 10012
(212) 941-1202

TIMOTHY B. DYK
(Counsel of Record)
ROBERT H. KLONOFF
PATRICIA A. DUNN
LIA WOODALL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 879-3939
Counsel for the Amici

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a state's ban on non-obscene nude dancing in adult-only establishments violates the First Amendment.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
INTEREST OF THE AMICI	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THIS COURT HAS HELD THAT SPEECH DEALING WITH SEXUAL MATTERS CAN ONLY BE PROHIBITED UNDER THE STANDARD OF *MILLER v. CALIFORNIA* AND THAT NUDE PERFORMANCES ARE PROTECTED SO LONG AS THEY ARE NOT OBSCENE	6
A. Petitioners' Approach Constitutes A Thinly-Disguised Effort To Overrule *Miller v. California*	6
B. This Court Has Recognized That Non-Obscene Nude Dancing Is Protected By The First Amendment	8
II. PETITIONERS CANNOT EVADE THE *MILLER* STANDARD BY SUGGESTING THAT RESPONDENTS' PERFORMANCES ARE NOT COMMUNICATIVE	12
III. THE *O'BRIEN* TEST IS INAPPLICABLE	15
IV. INDIANA'S PROHIBITION ON NUDE DANCING CANNOT BE JUSTIFIED BY ITS INTEREST IN REGULATING SECONDARY EFFECTS OF THE PROTECTED SPEECH	18
V. INDIANA'S PUBLIC INDECENCY STATUTE IS A CONTENT-BASED BLANKET BAN THAT CANNOT QUALIFY AS A TIME, PLACE AND MANNER RESTRICTION	20
A. Indiana's Public Indecency Statute Is Content-Based	21

TABLE OF CONTENTS—Continued

Page

B. The Statute's Absolute Prohibition On Non-Obscene Nude Dancing Forecloses Any Adequate Alternative Avenues For The Communication 23

VI. SUSTAINING INDIANA'S BAN ON NUDE DANCING WOULD THREATEN FIRST AMENDMENT PROTECTIONS FOR OTHER FORMS OF NON-VERBAL EXPRESSION.... 25

CONCLUSION 28

TABLE OF AUTHORITIES

CASES: Page

Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988) 8, 11
American Booksellers Association v. McAuliffe, 533 F. Supp. 50 (N.D. Ga. 1981) 8
American Booksellers Association v. Webb, 643 F. Supp. 1546 (N.D. Ga. 1986) 8
Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983) 7
Boos v. Barry, 485 U.S. 312 (1988) 4, 18, 19, 21, 30
Butler v. Michigan, 352 U.S. 380 (1957) 7
California v. LaRue, 409 U.S. 109 (1973) 8, 9
Carlin Communications, Inc. v. FCC, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924(1988).. 8
City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789 (1984) 16
City of Dallas v. Stanglin, 109 S. Ct. 1591 (1989).. 14
City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) 4, 18, 19, 20
Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984) 4, 20, 22
Cohen v. California, 403 U.S. 15 (1971) 17, 26
Community Television of Utah, Inc. v. Roy City, 555 F. Supp. 1164 (D. Utah 1982) 8
Cruz v. Ferre, 755 F.2d 1415 (11th Cir. 1985) 8
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975) 8, 9
Employment Division v. Smith, 110 S. Ct. 1595 (1990) 18
Erznoznik v. City of Jacksonville, 422 U.S. 205 (1975) 9
FCC v. Pacifica Foundation, 438 U.S. 726 (1978).. 11
Freedman v. Maryland, 380 U.S. 51 (1965) 9
FW/PBS, Inc. v. City of Dallas, 110 S. Ct. 596 (1990) 10
Ginsberg v. New York, 390 U.S. 629 (1968) 11
Home Box Office, Inc. v. Wilkinson, 531 F. Supp. 987 (D. Utah 1982) 8
Jenkins v. Georgia, 418 U.S. 153 (1974) 10
Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) 13, 14, 17

TABLE OF AUTHORITIES—Continued

	Page
Krueger v. City of Pensacola, 759 F.2d 851 (11th Cir. 1985)	8
Massachusetts v. Oakes, 109 S. Ct. 2633 (1989)	10
Miller v. California, 413 U.S. 15 (1973)	*passim*
New York v. Ferber, 458 U.S. 747 (1982)	11
New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981)	8, 10
Rushia v. Town of Ashburnham, 582 F. Supp. 900 (D. Mass. 1983)	8
Sable Communications of California, Inc. v. FCC, 109 S. Ct. 2829 (1989)	7
Schacht v. United States, 398 U.S. 58 (1970)	13
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981)	*passim*
Schneider v. New Jersey, 308 U.S. 147 (1939)	23, 24
Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)	9
Spence v. Washington, 418 U.S. 405 (1974)	18, 24
State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980)	21
Tattered Cover, Inc. v. Tooley, 696 P.2d 780 (Colo. 1985)	8
Texas v. Johnson, 109 S. Ct. 2533 (1989)	*passim*
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)	17
United States v. Albertini, 472 U.S. 675 (1985)	16
United States v. Eichman, 110 S. Ct. 2404 (1990)	*passim*
United States v. O'Brien, 391 U.S. 367 (1968)	*passim*
Ward v. Rock Against Racism, 109 S. Ct. 2746 (1989)	21, 22
Wilkinson v. Jones, 480 U.S. 926 (1987), *aff'g mem.* 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g Community Television of Utah, Inc. v. Wilkinson*, 611 F. Supp. 1099 (D. Utah 1985)	7
Winters v. New York, 333 U.S. 507 (1948)	14

TABLE OF AUTHORITIES—Continued

	Page
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	18, 20
Young v. Arkansas, 474 U.S. 1070 (1986)	10
CONSTITUTION AND STATUTES:	
U.S. Const. amend. I	*passim*
U.S. Const. amend. XXI	8, 9
Ind. Code Ann. (West 1986):	
§ 35-45-4-1	21
§ 35-49-1-7	6
§ 35-49-2-1	6
§ 35-49-3-2	6
§ 35-49-3-3	11
PUBLICATIONS:	
Cheshire, *Eroticism in the Performing Arts*, in Webb, THE EROTIC ARTS 297-306 (rev. ed. 1983)	14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

No. 90-26

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,
v.
GLEN THEATRE, INC., *et al.*; and
DARLENE MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE COALITION FOR FREEDOM OF EXPRESSION, AND THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

INTEREST OF THE AMICI[1]

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980

---

[1] Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, the organization now has over 290,000 members nationwide.

The Coalition for Freedom of Expression is an organization of concerned individuals, artists and arts organizations and institutions—including the American Film Institute, California Lawyers for the Arts, Independent Composer's Association, Los Angeles Philharmonic Association, Museum of Contemporary Art, Otis/Parsons Art Institute, PEN Center USA/West, UCLA Film and Television Archive and the Writers Guild of America/West —all of whom uphold and support the basic freedoms of thought, speech and expression in America.

The National Campaign for Freedom of Expression is an alliance of artists, arts organizations, and audiences formed to uphold and protect freedom of expression and to fight censorship throughout the United States.

These *amici* have filed briefs in this Court in other cases that implicate the concerns of their members for protecting such First Amendment freedoms. *See, e.g., United States v. Eichman*, 110 S. Ct. 2404 (1990). Their concern is not whether the specific activities in this case merit approval or disapproval as a matter of artistic taste. Instead, their concern is that this Court not set a precedent for the prohibition of a new category of material under the label of indecency, thus broadening the sweep of criminal statutes far beyond the obscene. The *amici* believe that this kind of prosecution would not only endanger the specific performances at issue here, but would reach protected expression generally and undermine long-standing First Amendment guarantees for much controversial or unorthodox expressive conduct that may be offensive to some members of our society.

SUMMARY OF ARGUMENT

I. The First Amendment protects non-obscene nude dancing. This Court has consistently recognized that government can prohibit speech involving sexual matters only under the standard of obscenity that this Court set forth in *Miller v. California*, 413 U.S. 15 (1973), and that a jury—not state regulators—must decide whether particular material is contrary to "contemporary community standards." Unwilling to attempt this burden, Indiana concedes that respondents' nude dancing is not obscene and seeks to ban that conduct under its public indecency statute. But Indiana cannot so easily evade this Court's *Miller* standard. This Court has firmly established that blanket bans on adult access to indecent, but not obscene, communications violate the First Amendment—even where the speech involves nudity. And, consistent with these principles, this Court has repeatedly stated that the First Amendment affords protection, in adult-only establishments, to nude dancing that is not obscene under the *Miller* test.

II. That nude dancing involves conduct, rather than spoken or written words, does not remove it from the First Amendment's protection or lessen this Court's exacting scrutiny of Indiana's law. In its recent flag-burning decisions, this Court made abundantly clear that "*conduct* may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989) (emphasis added); *see United States v. Eichman*, 110 S. Ct. 2404, 2407 (1990). Nude dancing plainly meets that test. Respondents' nude dancing communicates an unmistakable message—an emotive one of eroticism—that their patrons clearly understand. That this message is not political or educational—and, indeed, is offensive to some individuals—does not immunize it from First Amendment protection. Not unlike the erotic message that nude dancers have purveyed on more tradi-

tional stages throughout ancient and more modern times, respondents' conduct is communicative and entertaining. It is speech protected by the First Amendment.

III. Indiana's claim that the ban furthers governmental interests "unrelated to the suppression of free expression" is misguided. Indiana does not seek to ban nude dancing to promote interests "unrelated to the suppression of free expression" (*United States v. O'Brien*, 391 U.S. 367, 377 (1968); it seeks to prohibit nude dancing precisely because of the message of eroticism that it conveys—a message that it deems contrary to "public morality." This Court's decision in *O'Brien* is simply irrelevant here.

IV. Nor do this Court's decisions concerning state regulation of the "secondary effects" of speech provide petitioners any refuge. This case is not about the "secondary effects" of respondents' speech. Petitioners seek to prohibit respondents' performances because of Indiana's concern that erotic messages may undermine public morality, not because of concern with urban blight. This Court recently made clear that viewers' reactions to speech are not "secondary effects" that states can regulate free of First Amendment concerns. *See Boos v. Barry*, 485 U.S. 312 (1988). Indiana's law is also unconstitutional because it is not a regulation at all, but a total prohibition on respondents' speech. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

V. For similar reasons, Indiana's regulation of respondents' conduct is not a reasonable "time, place and manner" restriction. Indiana canot justify its prohibition "without reference to the content of the regulated speech" (*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); indeed, the regulation is not content-neutral at all because the message of respondents' speech—eroticism—is precisely what Indiana seeks

to ban. And Indiana's restriction forecloses any adequate alternatives for communication; it simply is not an answer for Indiana citizens to leave the state to enjoy nude dancing, or be relegated to viewing more conventional forms of dance within Indiana's borders.

VI. Sustaining Indiana's ban on non-obscene nude dancing would set a dangerous precedent under the First Amendment. Petitioners, in essence, ask this Court to draw a constitutional line between non-verbal conduct that constitutes "high" art—*e.g.*, ballet—and non-verbal conduct that amounts, in Indiana's view, to "low" entertainment—*e.g.*, the nude dance involved here. But the First Amendment recognizes no such line, particularly one that turns on the amount of clothing that a performer wears. To attempt to draw such a line would ultimately place at risk much accepted, albeit unconventional, First Amendment speech.

ARGUMENT

For nearly two decades, this Court has held that sexually explicit material that is not obscene is protected by the First Amendment. Petitioners seek a radical departure from established constitutional principles, relying on their own speculation about the effects of nude dancing and on decisions of this Court that have little or no relevance to either the legislative prohibition involved or to the facts in this case. This Court should not accept petitioners' invitation to rewrite the law of obscenity. Nor should it lose sight of the significant issues of freedom of expresesion at stake merely because the performances in question may not qualify, in the views of some individuals, as high artistic achievement.

I. THIS COURT HAS HELD THAT SPEECH DEALING WITH SEXUAL MATTERS CAN ONLY BE PROHIBITED UNDER THE STANDARD OF *MILLER v. CALIFORNIA* AND THAT NUDE PERFORMANCES ARE PROTECTED SO LONG AS THEY ARE NOT OBSCENE

A. Petitioners' Approach Constitutes A Thinly-Disguised Effort To Overrule *Miller v. California*

In *Miller v. California*, 413 U.S. 15 (1973), after decades of struggle with definitional questions, this Court held that speech addressing sexual matters can be prohibited only if a state can establish (1) that " 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," *id.* at 24 (citations omitted); (2) that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," *id.*; and (3) that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* Petitioners here chose not to prosecute respondents for violating Indiana's statutory prohibition of obscene performances. *See* Ind. Code Ann. § 35-49-3-2 (West 1986).[2] While petitioners profess a conviction that nude dancing "is clearly devoid of artistic content" (P. Br. at 10) and "does nothing more than arouse sexual urges" (*id.* at 24), they evidently

[2] That statute makes it a crime to engage in, manage or produce any "obscene performance." *Id.* The statute defines a performance as "any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons." *Id.* § 35-49-1-7. It further provides that a performance is "obscene" if "(1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex; (2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and (3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* § 35-49-2-1.

concluded that they would be unable to convince an Indiana jury that the dancing in question was contrary to "contemporary community standards" and have conceded that it was non-obscene. Pet. App. at 3. Unable to ban nude dancing under the *Miller* standard, petitioners seek to achieve the same result through Indiana's public indecency statute. This approach should not be seen as anything but a thinly-disguised effort to evade this Court's decision in *Miller*.

If the *Miller* standard cannot be satisfied, this Court has consistently held that sexual speech is protected and has rejected governmental attempts to ban supposedly "indecent" communications. In *Butler v. Michigan*, 352 U.S. 380 (1957), this Court overturned a conviction under a state statute that prohibited selling books to the general public if they had a potentially harmful effect on minors; it held that the statute impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children" and thus "arbitrarily curtail[ed] one of those liberties of the individual." *Id.* at 383-84. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court invalidated a blanket ban on unsolicited mailings of detailed advertisements concerning contraceptives and human sexuality, recognizing the First Amendment's protection of such speech. More recently, in *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2836 (1989), the Court invalidated a blanket ban on "indecent" telephone communications, making clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Virtually every recent federal court decision of which we are aware—whether involving live theater, film, broadcasting, cable, telephone, or print—has unhesitatingly concluded that blanket bans on such "indecent" speech violate the First Amendment.[3]

[3] In addition to the Supreme Court decisions discussed, *infra*, at 8-10, *see, e.g., Wilkinson v. Jones*, 480 U.S. 926 (1987), *aff'g mem.* 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g Com-*

B. This Court Has Recognized That Non-Obscene Nude Dancing Is Protected By The First Amendment

Even with respect to the precise issue here, the court below correctly recognized that it was "not writing on a clean slate." Pet. App. at 3. This Court has already stated, on several occasions, that the First Amendment affords protection to nude dancing. In *California v. LaRue*, 409 U.S. 109, 118 (1973), the Court concluded that a state could regulate nude dancing in establishments that serve liquor under the Twenty-First Amendment, but unanimously recognized that some nude performances "are within the limits of the constitutional protection of freedom of expression."[4] In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), the Court again recognized this protection. In invalidating an overbroad ordinance banning topless dancing in all public places, despite the municipality's authority to regulate under the Twenty-First Amendment, the Court stated that "[a]lthough the customary 'barroom' type of nude dancing may involve only

---

munity Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) (broadcasting); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) (telephone); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985) (live entertainment); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (print); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983) (print); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

[4] 409 U.S. at 118; *see id.* at 121 (Douglas, J., dissenting); *id.* at 123 (Brennan, J., dissenting); *id.* at 139 (Marshall, J., dissenting); *see also New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981).

the barest minimum of protected expression, we recognized in *California v. LaRue* . . . that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Id.* at 932.[5]

The Court has recognized that the First Amendment protects entertainment that includes nudity in other cases involving live or filmed public performances. The Court in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), invalidated an ordinance prohibiting drive-in movie theaters from exhibiting films displaying nudity, if the screen was visible from a public street. Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court held that a municipality's refusal to provide a stage for the rock musical *Hair* because it involved nudity and simulated sex was an unconstitutional content-based prior restraint, implicitly recognizing that the performance, if not obscene, was protected speech under the First Amendment.[6]

Most recently, this point was made explicit in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). In that case, the Court overturned the convictions of operators of adult bookstores, who offered their customers the opportunity to view live nude dancers behind a glass panel, under a zoning ordinance that prohibited all live entertainment. In so doing, the Court stated:

> Entertainment, as well as political and ideological speech, is protected. . . . Nor may an entertainment

---

[5] Petitioners here do not attempt to defend their actions under the Twenty-First Amendment. Pet. at 13 ("[T]he First Amendment issue is not clouded by the applicability of the Twenty-First Amendment . . . ."). This Court, accordingly, need not decide what impact that Amendment might have on petitioners' ability to regulate the respondents' conduct in this case.

[6] *See generally Freedman v. Maryland*, 380 U.S. 51 (1965).

> program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . [N]ude dancing is not without its First Amendment protections from official regulation.

Id. at 65-66; *see id.* at 80 (Stevens, J., concurring in judgment) ("the foliage of the First Amendment may cast protective shadows over some forms of nude dancing").[7]

This Court has thus made abundantly clear that, absent proof of obscenity under *Miller*, governmental bans on speech purveying nudity contravene the First Amendment.[8] While Judge Easterbrook seeks to dismiss each of these decisions on the ground that they did not afford absolute protection to nude dancing (Pet. App. at 93-96), the possibility that some nude dancing may be obscene

---

[7] Various members of this Court have, on other occasions, likewise recognized the First Amendment's protection of nude performances. *See FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604 (1990) (plurality recognized that "adult-only" establishments, including some with live non-obscene entertainment, have a valid First Amendment interest); *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2642 (1989) (Brennan, J., Marshall, J. & Stevens, J., dissenting) (citing *Schad* for proposition that the First Amendment protects nude dancing and modeling); *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J. & Brennan, J., dissenting from denial of certiorari) (noting the Court's "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment"); *New York State Liquor Authority v. Bellanca*, 452 U.S. at 718-19 (Stevens, J., dissenting) (noting that the Court had previously implied that "nude or partially nude dancing is a form of expressive activity protected by the First Amendment").

[8] *See, e.g., Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("nudity alone is not enough to make material legally obscene under the *Miller* standards").

easily explains this Court's reluctance to declare that all nude dancing is absolutely protected.

To be sure, as petitioners suggest (P. Br. at 23), "indecent" speech in general and nudity in particular may be regulated in ways not permissible when political speech is involved. But that different treatment has been reflected only in this Court's solicitude for statutes designed to enable parents to determine whether children should have access to indecent material. The Court has sustained statutes barring the sale to children of material that does not satisfy the *Miller* standard, but that does satisfy the so-called variable obscenity standard, *i.e.*, it involves material that is obscene as to children. *See, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (state can constitutionally restrict the dissemination of "girlie magazines" depicting nudity to minors). The Court has also sustained a regulation that allowed the "channelling" of indecent broadcast material to hours of the day when parents could exercise supervisory control over their children. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *see also Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).[9]

This situation, however, is not present here. Respondents limit the access to their nude performances to adult patrons of their establishments in accordance with the statutory law of Indiana. *See* Ind. Code Ann. § 35-49-3-3 (West 1986) (making it an offense to "conduct[] a performance before minors that is harmful to minors"). And petitioners do not and cannot claim that the purpose of the Indiana statute here is to enable parents to decide what their children shall see and hear.

---

[9] In *New York v. Ferber*, 458 U.S. 747, 756 (1982), this Court also upheld a ban on communications that involved so-called child pornography. But it did so only because of the state's acknowledged interest in preventing the exploitation of children during the production of such material, not because of the impact of the material on the recipients.

II. PETITIONERS CANNOT EVADE THE *MILLER* STANDARD BY SUGGESTING THAT RESPONDENTS' PERFORMANCES ARE NOT COMMUNICATIVE

Petitioners do not suggest that the indecency statute here serves a compelling state interest or that it constitutes the least restrictive alternative. Instead, they seek to evade the force of the *Miller* standard by urging that the nude dancing involved here—while not obscene—is not protected "communication" or that it can be banned without reference to standards of strict scrutiny.

Initially, petitioners and their *amici* argue that the statute is valid because it seeks to regulate conduct rather than speech. P. at 12-16; *Amici* Br. at 13-15. This is, of course, an entirely false dichotomy. Virtually all speech involves an indispensable element of conduct—ranging from the action of a soap-box speaker in the park who steps on his soap-box and gesticulates to the crowd to the newspaper publisher who must run his presses and dispatches his delivery trucks to carry his message to the general public. And this Court has consistently rejected the view that a regulation can escape strict scrutiny because the state characterizes it as a regulation of *conduct* rather than a regulation of *speech*. It is now well-settled that the First Amendment's protections "do[] not end at the spoken or written word" and that "*conduct* may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 109 S. Ct. at 2539 (emphasis added); *see United States v. Eichman*, 110 S. Ct. 2404, 2407 (1990). These decisions make abundantly clear that such "conduct—no differently than other sorts of expression—deserves First Amendment protection. The presence of a political message does not automatically immunize conduct from regulation; but, just as surely, the joining of speech and conduct does not remove the activity from the First Amendment's protection.

Nor can petitioners successfully argue that the performances here are unprotected because they "lack[] sufficient communicative elements to qualify as 'speech'" (P. Br. at 16) or because they merely "entertain" and convey an "emotional theme" (*id.* at 18). As petitioners appear to admit (P. Br. at 24), nude dancing communicates an unmistakable message—one of eroticism and human sensuality—that respondents' patrons plainly understand. That message is no less discernible from the stages of respondents' adult-only establishments than the non-verbal messages that ballet dancers convey to audiences from (perhaps more refined) stages, that actors in silent films convey to movie theater audiences, and that mimes convey to audiences from theater stages or make-shift platforms on city streets. No one would seriously question the artistic nature of these forms of non-verbal conduct or contend that the First Amendment affords them no protection. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970) (amateur street skit performed in protest of Vietnam conflict was a theatrical production protected under the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures are protected speech).[10]

That respondents' nude dancing may be "crude and amateurish and perhaps unappealing" (*Schacht*, 398 U.S. at 61-62) to some individuals does not make it less deserving of First Amendment protection. Indeed, as Judge Posner aptly explained (Pet. App. at 17-18), erotic danc-

[10] Petitioners suggest, as Judge Easterbrook did (Pet. App. at 85-86), that respondent Miller's testimony that she was "just entertaining, just dancing" (P. Br. at 6, 16) negates the communicative element of the conduct. It does not do so. First, other respondent-dancers testified that they intended their conduct to communicate, as petitioners concede. P. Br. at 17. Second, that respondent Miller was "just entertaining, just dancing" does not make her conduct devoid of expression; as we explain (*see* discussion, *infra*, at 14), the First Amendment protects conduct that is "entertaining" as well as other forms of expression. Finally, as the majority correctly concluded (Pet. App. at 8, 11-12), nude dancing is inherently expressive; it communicates an unmistakable, emotive message of eroticism.

ing has ancient roots. *See* Cheshire, *Eroticism in the Performing Arts*, in Webb, THE EROTIC ARTS 297-306 (rev. ed. 1983). Its role in more contemporary public performances—for example, the Dance of the Seven Veils in Strauss's *Soleme* and the more controversial musicial *Hair* —only underscores the artistic quality of nude dancing. Though perhaps less refined and choreographed, for constitutional purposes respondents' nude performances are artistic performances just like these unquestionably artistic (albeit more mainstream) performances.

Petitioners' contention that nude dancing is not protected speech because it entertains, rather than informs, is untenable. P. Br. at 18-23. This Court has never conditioned First Amendment protection on a showing that the speech is politically informative. *See, e.g., Schad*, 452 U.S. at 65 (nude dancing); *Joseph Burstyn*, 343 U.S. at 501 ("sacrilegious" film). Nor has it conditioned protection on a showing that the speech is educational or uplifting in some traditional sense. *See Winters v. New York*, 333 U.S. 507 (1948) (magazines containing accounts of criminal deeds). Rather, this Court has made plain that "[e]ntertainment, as well as political and ideological speech, is protected." *Schad*, 452 U.S. at 65.[11] Respondents' entertainment—and the "emotive" message that it conveys—warrant that protection here.[12]

---

[11] *See Joseph Burstyn*, 343 U.S. at 501 ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform"), citing *Winters*, 333 U.S. at 507.

[12] This case is distinct from the ballroom dancing that this Court declined to protect under the First Amendment in *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989). As the Court observed in *Stanglin*, where it upheld an ordinance restricting admission to dance halls to persons between ages 14 and 18, "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment." *Id.* at 1595. This associational activity is quite distinct from the nude dancing that respondents performed on stage to communicate their message of eroticism to willing adult audiences.

III. THE *O'BRIEN* TEST IS INAPPLICABLE

Petitioners also suggest (P. Br. at 35) that, even if the performances here are protected by the First Amendment, Indiana's statute should be measured and sustained under the standard articulated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Petitioners urge that the statute is constitutional because it furthers substantial government interets "unrelated to the suppression of free expression." *Id.* at 377. Petitioners' argument is wholly lacking in merit.

The *O'Brien* test was specifically developed to address the difficult question presented by symbolic speech. *O'Brien* involved the prosecution of a person for burning his draft card to protest the Viet Nam war and the draft under a criminal statute prohibiting destruction of draft cards. This Court explained that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. But "the governmental interest [must be] unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.* at 377. Thus, despite O'Brien's contention that he could not be punished for his political protest, the Court upheld the conviction because the substantial governmental interest in the "smooth and efficient functioning of the Selective Service System," *id.* at 382, was "limited to the noncommunicative aspect of O'Brien's conduct." *Id.* at 381-82.

Petitioners' analogy to *O'Brien* does not withstand analysis. While the government's interest in administratively tracking thousands of young men who might be called to serve in time of war may have been unrelated to the merits of O'Brien's political protest, Indiana's interest in public morality is directly concerned with the

erotic message conveyed by respondents' nude dancing. Despite petitioners' assertion that the statute's goals are unrelated to the suppression of speech (P. Br. at 36-37), it is evident that the State seeks to regulate the activity because of the message conveyed and for no other reason.[13] Unlike the governmental ban on both public and private draft card burning in *O'Brien*, Indiana does not in this statute seek to regulate nudity in private. *See O'Brien*, 391 U.S. at 375. It is simply *because* people may see the erotic message that Indiana seeks to prohibit public nudity.[14]

Obviously, Indiana seeks to bar these performances precisely because it dislikes the erotic message that the performances appear to convey—because the message communicated allegedly leads to immoral thoughts and behavior. In the State's view, nude dancing must be condemned because it "does nothing more than arouse sexual urges." P. Br. at 24. Drawing on Judge Coffey's dissenting opinion, petitioners speculate that the "public display of nudity naturally encourages activities which break down the family structure . . . [and] is damaging to society and citizens by degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal acivity." P. Br. at 36-37.

---

[13] For example, the State does not suggest that any physical contact will occur between the customers and the dancers. Indeed, in the bookstore operated by Glen Theatre, Inc., the customers sat in booths with glass panels from which they viewed the performances (P. Br. at 5), as in *Schad*, 452 U.S. at 62.

[14] The line of cases upon which Judge Easterbrook relies (Pet. App. at 79-80) are distinguishable. In each case, the Court held that the conduct may be regulated because the governmental interest was not designed to suppress the speech. *See, e.g., United States v. Albertini*, 472 U.S. 675 (1985) (government interest in security on a military base was unrelated to demonstrators' political protest); *Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (city's esthetic interest in eliminating visual clutter by banning posters was manner restriction unrelated to suppression of speech).

There is no legislative history to demonstrate that the legislature actually considered these interests, and the record in this case is completely devoid of any evidence to support them.[15] The Seventh Circuit correctly held, based on the State's assertion at oral argument, that the State's interest is "the protection of public morality generally, and the family structure in particular" (Pet. App. at 14); it thus concluded that the public indecency law "directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Id.* n.7.[16] That such expressive consequences of conduct cannot be tested by the *O'Brien* standard was made clear most recently in *Eichman*, 110 S. Ct. at 2407, where this Court stated:

> the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of *O'Brien*" because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message."

In short, here, as in *Cohen*, 403 U.S. at 18, the only "'conduct' which the State sought to punish [was] the

---

[15] *See Cohen v. California*, 403 U.S. 15, 23 (1971) (State's belief that four-letter word will inherently cause violent reaction reflects an "'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression'"), quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969); *cf. Schad*, 452 U.S. at 72-73.

[16] *See Joseph Burstyn*, 343 U.S. at 504-05 (1952) (rejecting state's interest in the prevention of "sacrilegious" movies as "broad and all inclusive" justification by which the "censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful othodoxies"). It is precisely because the state's interest in protecting public morality is so expansive and indefinable, and sweeps into its net all types of speech, that such speculative justifications are consistently rejected.

fact of communication." Because the restriction on expression cannot be "'justified without reference to the content of the regulated speech'" (*Eichman*, 110 S. Ct. at 2409, citing *Boos v. Barry*, 485 U.S. 312, 320 (1980)), it cannot be tested under the *O'Brien* standard.[17] To allow a state to ban nude performances would, contrary to the First Amendment, prohibit expression merely because it is morally offensive to some members of society. *See Eichman*, 110 S. Ct. at 2410, quoting *Johnson*, 109 S. Ct. at 2544.[18]

IV. INDIANA'S PROHIBITION ON NUDE DANCING CANNOT BE JUSTIFIED BY ITS INTEREST IN REGULATING SECONDARY EFFECTS OF THE PROTECTED SPEECH

Petitioners also argue that, even if the regulation is addressed to the communicative elements of respondents' performances, the State properly has an interest in regulating "secondary effects" of nude barroom dancing (P. Br. at 39-40), apparently relying on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). It is difficult to believe that petitioners can seriously make such an argument.

---

[17] *See Johnson*, 109 S. Ct. at 2542 ("outside of *O'Brien* test altogether"); *Spence v. Washington*, 418 U.S. 405, 414 n.8 ("four-step analysis of . . . *O'Brien* . . . is inapplicable").

[18] Petitioners further suggest that, even without complying with the *O'Brien* test, their prohibition of respondents' conduct is valid "regardless of its impact on expressive 'speech'" as a "content-neutral criminal prohibition" under *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). P. Br. at 32-33. *Smith* cannot be made to stand for such a proposition. Initially, as discussed *infra* at 21-23, the prohibition in this case is *not* content-neutral. In addition, unlike this case, the ruling in *Smith* was specifically limited to cases involving "a free exercise [of religion] claim unconnected with any communicative activity." *Smith*, 110 S.Ct. at 1600. Finally, accepting petitioners' argument would effectively overrule this Court's holding in *O'Brien*.

In *Renton*, this Court upheld a local zoning ordinance that regulated the location of adult theatres "to preserve the quality of urban life . . . ." 475 U.S. at 50. The evidence considered by the Renton City Council established that the "location of adult theatres ha[d] a harmful effect on the area and contribute[d] to neighborhood blight . . . ." *Id.* at 51. The Court held that the zoning ordinance was not aimed at the speech inside the establishments, but was concerned only with the secondary effects resulting from the placement of the establishments in local neighborhoods. Moreover, because it did not operate as a complete ban on the theatres themselves, the ordinance did not eliminate an entire category of speech. *Id.* at 48.

Indiana's statute does not operate in such a limited fashion. First, Indiana's desire to protect public morality, *i.e.*, to prevent "sexual urges" that result from viewing nude dancing, is simply not a secondary effect unassociated with this type of speech. As the Court made clear in *Boos*, "[l]isteners' reactions to speech are not the type of 'secondary effects' [that the Supreme Court] referred to in *Renton*." 485 U.S. at 321. In *Boos*, this Court hypothesized:

> [I]f the ordinance [in *Renton*] was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Id. This "psychological damage" is indistinguishable from Indiana's distilled concept of "public morality." For constitutional purposes, neither concept is properly characterized as a "secondary effect" of the speech.

Second, Indiana's law is not a regulation at all. It is a prohibition and, as such, cannot be justified under this Court's secondary effects decisions. "The Renton ordinance, like the one in *American Mini Theatres*, d[id] not ban adult theaters altogether . . . ." *Renton*, 475 U.S. at 46. As this Court said in *Renton*, to close the door on a particular type of speech "presumptively violate[s] the First Amendment." *Id.* at 41. Indiana's statute plainly closes that door here; it bans all public nude dancing anywhere, anytime.

V. INDIANA'S PUBLIC INDECENCY STATUTE IS A CONTENT-BASED BLANKET BAN THAT CANNOT QUALIFY AS A TIME, PLACE AND MANNER RESTRICTION

Petitioners finally contend that the definition of nudity in Indiana's public indecency statute "is clearly a limitation on the *manner* in which the dance is performed" (P. Br. at 39) (emphasis in original), and thus falls within the time, place and manner standard for regulating otherwise protected expression under the First Amendment. *Id.* at 38-41. To avail itself of this standard, however, the State must demonstrate that its restriction is "justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Just as petitioners failed to satisfy the *O'Brien* standard,[19] they failed to meet their burden of establishing that the indecency statute fits within the specific limits of this Court's "time, place and manner" standard.

---

[19] *See Clark*, 468 U.S. at 298 ("the four-factor standard . . . for validating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions").

A. Indiana's Public Indecency Statute Is Content-Based

Petitioners' attempt to characterize the statute as content-neutral is without support. Petitioners contend that "the history of the crime of public indecency is strong evidence that the statute was not intended to discriminate on the basis of viewpoint." P. Br. at 28. Petitioners also claim neutrality because the "statute by its own terms bans *all* nudity in public." *Id.* at 30 (emphasis in original). But the statute's viewpoint neutrality is superficial only, since petitioners make clear that Indiana plans to apply its nudity ban selectively, banning petitioners' performances but exempting higher art forms like ballet. *Id.* at 21.[20]

Even if Indiana's law were not "directly viewpoint-based," *Boos*, 485 U.S. at 319, that would "not render the statute content-neutral." *Id.* The First Amendment remains hostile to regulations that prohibit an entire category of speech and treats such regulations as content-based. *Id.* As applied, the Indiana statute completely bans an entire category of protected speech, *i.e.*, non-obscene, nude barroom dancing.

In determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989). Here, Indiana's public indecency law is content-based because it cannot be "'*justified* without reference to the content of

---

[20] *See State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980) (court construed indecency statute "to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved"). While Indiana interprets the *Baysinger* holding to exempt nude dancing performed "in the course of a protected theater production" (P. Br. at 25), it is undisputed that state law "enforcement officials had arrested and prosecuted nude dancers [such as those involved here] under § 35-45-4-1, and would do so in the future." P. Br. at 4.

the regulated speech.'" *Ward*, 109 S. Ct. at 2754, quoting *Clark*, 468 U.S. at 293 (emphasis added in *Ward*). Indeed, the State justifies its suppression of nude dancing with reference to the particularized message of "eroticism and sensuality" (Pet. App. at 11); it cannot articulate a justification without expressing a viewpoint at odds with the erotic message conveyed. The State's purpose of protecting public morality is advanced only because the State believes that completely nude dancing conveys a more damaging or undesirable message than dancing while partially clad.

This Court's decisions in *Ward* and *Clark* do not, as petitioners suggest (P. Br. at 39), teach that such a prohibition is content-neutral. In *Ward*, this Court held that the city's sound-amplification guideline was content-neutral because the city's justifications—its "desire to control noise levels at Bandshell events . . . and to avoid undue intrusion into residential areas and other areas of the park" (*Ward*, 109 S. Ct. at 2754)—were unrelated to the content of the musicians' performances; the city did not "attempt to serve purely aesthetic goals by imposing subjective standards of acceptable sound mix on performers [that] would raise serious First Amendment concerns . . . ." *Id.* at 2754-55. So too, in *Clark*, this Court upheld a no camping regulation precluding homeless people from sleeping in symbolic tent cities as a reasonable manner restriction on their demonstration; the government's interest in maintaining attractive and accessible parks was unrelated to the demonstrators' political message (*id.* at 296, 299), and "it [was] not disputed . . . that the prohibition . . . [was] not being applied because of disagreement with the message presented." *Id.* at 295. In contrast to both *Ward* and *Clark*, the Indiana statute here runs directly contrary to this Court's " 'longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.' " *Boos*, 485 U.S. at 322.

Contrary to petitioner's contention (P. Br. at 30), the fact that the statute may also prohibit non-communicative activities does not render it content-neutral. In *Johnson*, the Court invalidated a flag desecration statute even though it assumed that the statute was not limited "only to *expressive* conduct protected by the First Amendment" and that the statute might constitutionally be applied to such nonexpressive conduct. 109 S.Ct. at 2538 n. 3 (emphasis in original).

B. The Statute's Absolute Prohibition On Non-Obscene Nude Dancing Forecloses Any Adequate Alternative Avenues For the Communication

The Indiana statute also cannot qualify as a neutral time, place, and manner regulation because it forecloses any adequate alternatives for the communication. The suggestion that "[p]eople who seek this lifestyle are free to live in areas that cater to this moral climate" (Pet. App. at 51 (Coffey, J., dissenting))[21] has been rejected by this Court under strikingly similar circumstances. In *Schad*, 452 U.S. 61, a case notably absent from the brief of petitioners and their *amici*, this Court rejected the argument that because "live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough" (*id.* at 76), adequate alternative channels of communication existed. This Court reiterated that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Id.* at 76-77, quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). *Schad* thus makes clear that Indiana cannot satisfy this element of the manner restriction by relying on nude dancing outside its borders.

---

[21] Judge Coffey suggested that Indiana citizens who feel deprived should move to places "that tolerate[] and perhaps even welcome[] public nudity such as the likes of Las Vegas, San Francisco and others." Pet. App. at 51.

Nor can the Indiana statute be justified as a "manner" restriction merely because it only interferes with nude dancing by requiring that the dancers wear "pasties" and "g-strings," or on the theory that the message can still be conveyed in other ways. P. Br. at 40. This Court summarily rejected a similar argument in *Spence v. Washington*, 418 U.S. 405 (1974). There, the Court reversed a conviction for taping a removable peace symbol onto a flag displayed in an apartment window. Citing *Schneider*, *supra*, the Court refused to accept the state court's rationale that the "inhibition on [the] freedom of expression [was] 'miniscule and trifling' because there [were] 'thousands of other means available to [appellant] for the dissemination of his personal views . . . .'" *Id.* at 411 n.4 (citation omitted). That argument would permit the State to censor any performance, or indeed any literary work, by claiming that the message could be conveyed in a less direct and a more conventional manner. Applied throughout First Amendment jurisprudence, this notion would eviscerate freedom of expression because any idea could conceivably be expressed in some other manner. Prohibiting nude dancing entirely is thus not a mere restriction on the "manner" of speech; it is a regulation for which the time is forever, the place is the entire state, and the manner is a total ban on nudity.[22]

This is not to suggest that time, place and manner restrictions have no role in the regulation of public nudity. Contrary to petitioners' arguments (P. Br. at 40) and those of some of the dissenting judges below (Pet. App. at 97-98 (Easterbrook, J., dissenting); *id.* at 104 (Manion J., dissenting)), affirmance here will preserve Indiana's right to bar nude performances in the public streets and its ability to require that these performances be held

[22] Indiana itself must view the kind of erotic message that is conveyed by total nude dancing as more significant than the kind of erotic message that is conveyed by dancing with pasties and a g-string since it prohibits the former and permits the latter.

in places where audiences can be controlled, minors excluded and admission confined to those adults who seek to attend. Such restrictions, which may serve significant governmental interests, are entirely different from a blanket ban on nude dancing at all times and in all public places. *See* Pet. App. 14-15.

VI. SUSTAINING INDIANA'S BAN ON NUDE DANCING WOULD THREATEN FIRST AMENDMENT PROTECTIONS FOR OTHER FORMS OF NON-VERBAL EXPRESSION

Petitioners ask this Court to draw a dangerous line between conduct that is, and conduct that is not, protected speech. It is seemingly beyond question, even to petitioners (P. Br. at 22-25), that non-verbal conduct—like the dances in *Swan Lake* or *West Side Story* falling in the category of "high" art—deserves First Amendment protection; in fact, they begrudgingly concede that "[n]o doubt *some* dance is communicative" (*id.* at 21; emphasis in orignal). Though they insist that this case is not about drawing a line between "high art" and "low entertainment" (*id.* at 22-23), their own words—that "[a] nude 'ballet' dance on the bar at the Kitty Kat Lounge may not be protected, while a 'go-go' dance in the course of a protected theater production such as *Hair* and *Oh! Calcutta* might qualify as speech" (*id.* at 24-25)—prove the contrary.

The line that petitioners draw has no basis in the First Amendment.[23] If Indiana can ban nude performances on the stages of respondents' establishments, it and other states could as easily ban ethnic dancers—like

[23] Indeed, as evidenced by the current exhibition at The Museum of Modern Art entitled "High and Low: Modern Art and Popular Culture," this elusive line cannot be drawn even by thoughtful observers.

scantily-clad belly dancers in Morrocan restaurants or nude dancers in *Les Ballets Africains de Keita Fodeba* —from providing their cultural entertainment to willing audiences; it could likewise ban nude dances that are part of off-broadway, off-off-broadway or "alternative" productions; and it could—as petitioners claim they have the authority to do (Pet. App. at 45-46)—ban even movies with nude scenes. In short, if Indiana can prohibit any of these forms of artistic expression—merely because it finds some of these performances offensive—this country will have lost one of its most fundamental and cherished liberties.

It is no answer, and certainly no comfort to the *amici*, that nude dancers can supposedly communicate "any alleged 'erotic message' . . . just as effectively in scanty apparel as in total nudity." P. Br. at 40. This is yet another facile and unworkable distinction. Indiana now believes that pasties and a g-string promote its public morality goal without foreclosing erotic communication. But, if this Court adopts petitioners' rule, Indiana may next choose to promote that goal by requiring yet other pieces of clothing. It might further chill expression by requiring a dancer to wear a bikini or a leotard, or even bathrobes like those worn by the performers in the opening dance in *Oh! Calcutta.*[24] The First Amendment, however, prohibits such subjective and dangerous line-drawing based on the "inherently boundless" notion of "public morality." *Cohen*, 403 U.S. at 25. As Justice Harlan wrote in *Cohen*:

> [I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because

[24] As Judge Posner aptly states in his concurrence below, "it would violate the First Amendment to require museums to place figleaves and brassieres on their paintings and statutes. Perhaps the Indiana statute effects a parallel mutilation of striptease dancing." Pet. App. at 42 (Posner, J., concurring).

> governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id.

Banning respondents' nude dancing, based on such unprincipled distinctions, would thus have deep and long-lasting effects on the First Amendment. Nude dancing is non-verbal conduct, but speech nonetheless. It is communicative. It is artistic to some. And it is entertaining to those who choose to enjoy it. That some members of society find it non-communicative, non-artistic and offensively non-entertaining does not deprive it of First Amendment protection. Indeed, " '[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.' " *Eichman*, 110 S. Ct. at 2410, quoting *Johnson*, 109 S. Ct. at 2544. This Court should not depart from that fundamental principle here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Of Counsel:

ELLIOT M. MINCBERG
PEOPLE FOR THE AMERICAN WAY
2000 M Street, N.W.
Washington, D.C. 20036
(202) 467-4999

STEPHEN F. ROHDE
THE COALITION FOR FREEDOM OF EXPRESSION
1880 Century Park East
Los Angeles, CA 90067
(213) 277-1482

MARY D. DORMAN
THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION
568 Broadway
New York, NY 10012
(212) 941-1202

TIMOTHY B. DYK
(Counsel of Record)
ROBERT H. KLONOFF
PATRICIA A. DUNN
LIA WOODALL
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 879-3939
Counsel for the Amici

DECEMBER 1990

MOTION FILED
DEC 14 1990

No. 90-26

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana: LINLEY E. PEARSON, Attorney General of Indiana, and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners.

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*.

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

MOTIONS (2) AND AMICUS CURIAE BRIEF OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

JAMES J. CLANCY
9055 La Tuna Canyon Road
Sun Valley, California 91352
(818) 352-2069
Counsel for Amicus Curiae

December 4, 1990

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana: LINLEY E. PEARSON, Attorney General of Indiana, and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners.

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

MOTION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE OUT OF TIME; AND, MOTION FOR LEAVE TO ARGUE AS AMICUS CURIAE THE DEFENSE OF LACK OF FEDERAL JURISDICTION UNDER FEDERAL RULES OF CIVIL PROCEDURE, RULES 12(b)(1) AND 12(b)(6); OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

During the first week in November 1990, Moving Party had occasion to examine the pleadings on file herein and discovered that:

(1) the federal civil rights action filed by Glen Theaters, Inc. et al, in the United States District Court under 42 U.S.C. section 1983 was in fact an improper collateral attack on the state court judgment in Indiana v. Baysinger, 272 Ind. 236, and, as such, was subject to the jurisdictional bar established in Huffman v. Pursue Ltd., 420 U.S. 592;

(2) the Petitioner Michael Barnes, Prosecuting Attorney of St. Joseph County, Indiana was not aware that this Huffman Eleventh Amendment bar was available to the State of Indiana, because of the obscure manner in which the jurisdictional bar is "framed" in the Huffman opinion (last paragraph of Justice Rhenquist's opinion), see Associate Justice Kennedy's concurring opinion in World Famous Drinking

Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084, discussed at pages 37-39 of the attached Brief Amicus Curiae;

(3) the Huffman jurisdictional bar is still a live but "undiscovered" issue in this Court (see Brief Amicus Curiae at page 11 and Appendix G-15 and G-16.

At the time of the above discovery, Moving Party was engaged in legal research for a City Attorney's Office which is defending against the same type of improper "collateral attack" in a Civil Rights action filed by an "adult bookstore" in the United States District Court under 42 U.S.C. section 1983.

In that case, the Civil Rights action collaterally attacked an order of the City Council, which had revoked the adult bookstore's business license on the ground of fraud, following a full adversary hearing. Although the municipal code specifically authorized a direct appeal of the City Council's

decision to the state court, and the City Council had stayed its revocation order to allow the adult book store to appeal its decision directly to the state court, the adult bookstore ignored the state procedure and the judicial remedy it provided, and filed the federal civil rights action in the United States District Court pursuant to which it obtained a preliminary injunction against further city action.

As in the petition for writ of certiorari herein by the Prosecuting Attorney of St. Joseph's County, Indiana, the City Attorney's office also was unaware of the jurisdictional bar simply because of the obscure manner in which that jurisdictional bar is presented in the Huffman opinion.

The confusion among jurists as to the significance of Huffman, noted by Associate Justice Kennedy in the City of Tempe case, supra, is shared by the parties. Not only are plaintiffs

generally unaware that Huffman is a bar to such a collateral federal attack, the governmental attorneys themselves are also unaware that Huffman is available to defeat the federal lawsuit by requiring that the constitutional issue be tried in the state court.[1] This misunderstanding of the law results in a

---

[1] The City Attorney's Office has since concurred in the analysis of the Huffman jurisdictional bar which is set forth in the attached Amicus Curiae Brief, and has moved the United States District Court under Huffman, supra, and under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), to dismiss the civil rights lawsuit for lack of federal jurisdiction of the subject matter, and failure to state a claim upon which federal relief can be based; and has requested the Court to issue an order to show cause why the video outlet should not be required to address its claims in its answer to the state declaratory judgment lawsuit which the City has since filed in the state court (which addresses the same issues that are raised in the federal civil rights lawsuit).

multiplicity of lawsuits, which hamstring state law enforcement efforts to properly discharge responsibilities and duties owed its citizens under the state police power. The confusion surrounding the nature and extent of the Huffman jurisdictional bar is an issue which urgently needs resolution.

Having determined that the Huffman jurisdictional bar should be brought to the attention of this Court, Moving Party commenced work on an amicus curiae brief and obtained the oral consents of Petitioners and Respondents to file an Amicus Curiae Brief in Support of Petitioners. Upon its completion, Moving Party became aware that its contents would not be readily and fully comprehended unless copies of the eight briefs on file in this Court, to which Moving Party refers and of which this Court is requested to take judicial notice, were made available for immediate reference of the members of

the Court and parties as appendices to the brief. Without a reference to concrete examples of the problems which have been created in other situations where this Court has delayed making the "decision" which is needed to be made, it is difficult to comprehend the urgent need to examine and clearly define the Eleventh Amendment rationale upon which the Huffman jurisdictional bar is based. See Ex Parte Young, 209 U.S. 123 (1908) and Brief Amicus Curiae at 11-15, 27-34, and 37-39.

As appellant Huffman argued in his "Brief for Appellants" at Point III(A): "It was the intent of Congress at that time that those sections (civil right statute) should not be interpreted as a general federal Tort law authorizing interference with what traditionally are matters for the State Courts." The opposite "practice" has developed, governmental attorneys are unnecessarily burdened, and the federal courts are

clogged with improper filing, such as Barnes v. Glen Theater, Inc. et al. herein.

The burden of preparing multiple copies of the Amicus Brief and Appendices A through I (Huffman, Vixen, Rabe, Jartech, and Gow pleadings), and slow performance of Moving Party's xerox 3107 duplication machine made it impossible to file this Brief Amicus Curiae by the November 15, 1990 deadline. Accordingly, Moving Party informed the Petitioners and Respondents that his Amicus Brief on the jurisdictional bar would be filed in support of neither party and requested their consent in writing, which was given.

Moving Party submits that the attached Amicus Curiae Brief, which introduces the issue of "lack of federal jurisdiction" under Huffman, meets the "content" requirement of Rule 37.1 of the United States Supreme Court,

reading:

> "37.1. An amicus curiae brief which brings relevant matter to the attention of the court that has not already been brought to its attention by the parties is of considerable help to the Court..."

Because it is important that Huffman, supra, should be properly understood, this Court should grant Moving Party's motion for leave to file the attached Brief Amicus Curiae out of time. From a technical standpoint, Rule 37.3 would authorize such filing as timely, were it "treated" as a brief amicus curiae in support of the Respondents. Written consent of the parties is being filed with the Court concurrently with this motion.

Moving Party also moves the Court, pursuant to Rule 28.7, for leave to argue as Amicus Curiae the "jurisdictional bar" which was established in Huffman v. Pursue Ltd.,

420 U.S. 592 at 612. See Stern, Gressman, and Shapiro, Supreme Court Practice (6th Ed.) at page 590.

Pursuant to rule 29.2 of this Court, Moving Party on December 15, 1990 filed 40 copies of a bound volume with the Clerk of this Court, attention Deputy Clerk W.V. Gullickson, containing: (1) a 65 page Amicus Curiae Brief raising the 11th Amendment jurisdictional issue; (2) a Motion for Leave to File an Out of Time Amicus Curiae Brief; (3) a Motion for Leave to Argue the 11th Amendment jurisdictional question; and (4) Appendices A through I, containing copies of records of this Court in other cases as to which the court is requested to take judicial notice. On Wednesday, December 19,1990, a phone call was received in which Deputy Clerk W.V. Gullickson informed Moving Party that the Clerk's office had interpreted Appendix A through I, which contained copies of other records of

this Court, as being a part of the argument in the brief, which therefore exceeded the 65 page limit; that such required that the Brief Amicus Curiae and the two Motions be severed from the Appendix and filed separately with the Clerk of the Court, who would make the Appendix available for the use of any member of the Court who might request use of the same. As required by the Clerk's action, Moving Party has severed the Brief Amicus Curiae and the two accompanying Motions from the Appendix and is filing the same with this Court, pursuant to Rule 29.2.

Moving Party submits that the 11th Amendment jurisdictional question raised herein is of such overriding importance to the federal-state relationship, that the individual justices, pursuant to their sworn duty to follow and apply the Constitution, should themselves, and independently of these motions or any action by the parties, consider and

answer with finality the 11th Amendment jurisdictional question raised herein. Moving Party submits that it was not within the contemplation of the founding fathers, at the time of the 11th Amendment enactment, that an individual such as strip-teaser Darlene Miller et al. should be permitted to sue the attorney general of the state in a federal court collateral attack against a "Sir Charles Sedley" model state statute (which is aimed at controlling public lewdness), which has been found to be facially constitutional as a matter of law. In such a case, the Ex Parte Young fiction has absolutely no relevance, and a federal court clearly has no jurisdicition to consider such a sham pleading. To avoid the jurisdictional issue herein would only promote the distortion of the law that presently exists in the federal-state relationship.

As was stated by this Court in

Brown Shoe Co. v. U.S., 370 U.S. 294, 8 L.Ed.2d 510 at 524, 82 S.Ct. 1502 (June 25, 1962):

> "...a review of the sources of the Court's jurisdiction is a threshold inquiry appropriate to the disposition of every case that comes before us..."

Furthermore, it has always been the practice of this Court to consider the jurisdictional question before reaching the merits. In Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 209, 10 L.Ed.2d 297, 300, 83 S.Ct. 1185 (May 13, 1963) this Court noted:

> "...At the outset we are met with an issue which is said to be jurisdictional...as is our practice we will consider this threshold question before reaching the merits..."

Dated: December 22, 1990.

Respectfully Submitted,

James J. Clancy
Amicus Curiae

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of
St. Joseph County, Indiana: LINLEY E. PEARSON,
Attorney General of Indiana, and INDIANA
ALCOHOLIC BEVERAGE COMMISSION,

Petitioners.

vs.

GLEN THEATRE, INC., *et al.;* DARLENE MILLER, *et al.;*
and CIVIL CITY OF SOUTH BEND, *et al.*

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF
OF JAMES J. CLANCY, ATTORNEY AT LAW,
IN SUPPORT OF
NEITHER PETITIONERS NOR RESPONDENTS

SUBJECT INDEX

INTEREST OF AMICUS CURIAE JAMES J. CLANCY.....2

STATEMENT OF FACTS.....11

STATEMENT OF THE CASE (ISSUES).....11

SUMMARY OF ARGUMENT.....14

ARGUMENT.....18

I

THE RIGHT OF A STATE TO ADDRESS AND REGULATE SEXUAL CONDUCT IN PUBLIC IS A FUNDAMENTAL RIGHT, ENJOYED BY THE CITIZENS OF EVERY TOWN, CITY, VILLAGE, ETC. THE POWER TO ENFORCE THOSE RIGHTS WHICH ARE COLLECTIVELY POSSESSED BY THE INDIVIDUAL STATE GOVERNMENTS, EXISTED LONG BEFORE, AND WAS NOT AFFECTED BY, THE ENACTMENT OF THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.....18

II

INDIANA CODE 35-45-4-1 IS CONSTITUTIONAL ON ITS FACE AS A MATTER OF LAW...21

III

THE CITY OF SOUTH BEND, INDIANA, "HUFFMAN" CHALLENGE IN THE TRIAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED: (1) LACK OF FEDERAL (SUBJECT MATTER) JURISDICTION; (2) FAILURE TO STATE A CLAIM ("SUBJECT MATTER") UPON WHICH RELIEF CAN BE BASED; (3)

STATE SOVEREIGNTY - POLICE POWER (10TH AMENDMENT); AND (4) RIGHT TO BE SUED ONLY IN STATE COURT (11TH AMENDMENT), ALL OF WHICH WERE VIOLATED BY THE COURT OF APPEALS ORDER OF REMAND TO THE UNITED STATES DISTRICT COURT IN 1982....25

III(A)

THE 1986 COURT OF APPEALS RULING THAT THE INDIANA PUBLIC INDECENCY STATUTE WAS FACIALLY CONSTITUTIONAL IS CORRECT.....26

III(B)

THE 1986 COURT OF APPEALS REMAND OF THE CASE TO THE UNITED STATES DISTRICT COURT, WITHOUT INSTRUCTIONS THAT THE PLAINTIFFS HAVE THE BURDEN OF PROOF AND MUST PLEAD AND PROVE THE HUFFMAN EXCEPTION FOR FEDERAL (SUBJECT MATTER) JURISDICTION WAS REVERSIBLE ERROR.....26

III(C)

UNDER ITS DE NOVO REVIEW, THE COURT OF APPEALS IN 1986 SHOULD HAVE RECOGNIZED THAT PLAINTIFFS' CLAIM, THAT "STRIP TEASING" WAS "EXPRESSIVE CONDUCT" WHICH WAS PROTECTED BY THE FIRST AMENDMENT, WAS A SHAM, AND SHOULD HAVE DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH FEDERAL RELIEF COULD BE GRANTED.....29

III(D)

THE 1986 COURT OF APPEALS MISUNDERSTANDING OF HUFFMAN CAN BE TRACED TO THIS COURT'S REFUSAL IN

THE LAST PARAGRAPH OF THE HUFFMAN OPINION TO EXPLAIN MORE CLEARLY THE BASIS FOR ITS INSTRUCTIONS TO THE TRIAL COURT UPON REMAND.....35

III(E)

IN A PROPER CASE, AS HERE, THERE IS NO REQUIREMENT UNDER THE HUFFMAN PRECEDENT FOR A PENDANT STATE PROCEEDINGS.....37

III(F)

FROM A "PLEADING" STANDPOINT, PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE THE "EXCEPTION" FOR FEDERAL JURISDICTION TO ATTACH.....39

III(G)

THERE ARE VALID PUBLIC POLICY REASONS WHY, IN VIEW OF THE "STATE SOVEREIGNTY" CONSIDERATION, THE JURISDICTION OF THE STATE COURT SHOULD BE HELD TO BE EXCLUSIVE...44

III(H)

AS THE CUSTODIAN OF PUBLIC MORALS, THE EN BANC APPEALS COURT FOR THE 7TH CIRCUIT HAS VIOLATED ITS CONSTITUTIONAL DUTY TO ARTICULATE THE COMMON LAW (NATURAL LAW) CONSENSUS ON PUBLIC MORALS THAT UNDERPINS OUR JUDEO-CHRISTIAN SOCIETY.....45

(1) THE "HUFFMAN" APPEAL (CIVIL CASE).....51

(2) THE "VIXEN" APPEAL (CIVIL CASE).....56

(3) THE "RABE" WRIT OF CERTIORARI (CRIMINAL CASE).....59

(4) THE MITCHELL BROTHERS SANTA ANA THEATER PETITIONS FOR WRITS OF CERTIORARI (CIVIL CASE).....62

CONCLUSION.....64

TABLE OF AUTHORITIES CITED

CASES

Aday v. Municipal Court for Burbank Judicial Dist., 210 Cal.App. 229 (2d Dist. 1962).....6

Alberts v. California, 354 U.S. 476 (1956).....18

Allen v. McCurry, 449 U.S. 90 (1980).....39, 41

City Court of Tucson v. Law, 16 Az. 12.....34

Clark v. Indiana, 446 U.S. 937 (1980).....24

Cooper v. Mitchell Brothers' Santa Ana Theatre, 454 U.S. 90 (1981).....62

Dallas v. Stanglin, ____U.S.____, 104 L.Ed.2d 18, 109 S.Ct. 1591 (1989).....31

Dombrowski v. Pfister, 380 U.S. 479 (1965).....45

Ex Parte Young, 209 U.S. 123 (1908).....13, 15, 28, 29

General Trust Company v. Blodgett, 287 U.S. 509.....23

Glen Theatre v. Civil City of South Bend, 726 F.Supp. 728 (1985).....11, 26, 27, 58

Glen Theatres, Inc. v. Pearson, 802 F.2d 287 (CA 7, 1986).....26

Hicks v. Miranda, 422 U.S. 332 (1975).....24

Huffman v. Pursue, Ltd., 420 U.S. 592 (1973).....11, 15, 16, 24, 25, 26, 27, 28, 30, 35, 36, 37, 38, 50, 51, 53, 54, 55, 56, 63

Indiana v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (Ind. 1980).....15, 16, 23, 24, 25, 26, 30, 32, 43

Glen Theatres, Inc. v. Civil City of South Bend, 695 F.Supp. 414 (1988).....16

Judice v. Vail, 430 U.S. 327 (1977).....36

Juncker v. Tinney III, 549 F.Supp. 574 41

Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959).....23, 44

Martinez v. Claifornia, 444 U.S. 277 (1980).....39, 43

Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981).....45

Middlesex County Ethics Commission v. Garden State Bar Association, 457 U.S. 423 (1982).....36

Miller v. Civil City of South Bend, 904 F.2d 1081 (CA 7, 1990).....19, 21, 33

Moore v. Sims, 442 U.S. 415 (1978).....36

A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., 413 U.S. 905 (1973).....50, 56, 57, 61, 62, 63

Parratt v. Taylor, 451 U.S. 527 (1981).....39, 42

Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 (1987).....28, 37, 42

People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55.....44

James Phelan v. Commonwealth of Virginia, 12 L.Ed. 1030 (1850).....49

Rabe v. State of Washington, October Term, 1971, No. 71-247.....50, 58, 59

Sir Charles Sedlys Case, 83 Eng.Rep. 1146 (K.B. 1663).....17, 20, 22, 49, 50

Tilton v. Richardson, 403 U.S. 677 (1971).....45

Trainor v. Hernandez, 431 U.S. 434 (1977).....36

United States v. O'Brien, 391 U.S. 367 (1968).....32, 34

United States v. 37 Photographs, 402 U.S. 363 (1973).....44

U.S. Marketing, Inc. et al. v. Idaho,

445 U.S. 110 (1982).....63

Vickory v. Walton, 721 F.2d 1062 (CA 6, 1983).....42, 43

Walker Jr. v. City of Kansas City, Missouri, 911 F.2d 80 (CA 8, 1990).....18, 31

Washington v. Rabe, 484 P.2d 917 (1971).....60

World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (1987)....30, 39

Younger v. Harris, 401 U.S. 37 (1971).....27, 54, 55

STATUTES, ORDINANCES, RULES

State of Indiana Code
Section 35-45-4-1....21, 22, 24, 28

United States Constitution
Amendment 1.....12, 14, 21, 29, 31, 46, 65
Amendment 9.....11, 14, 20
Amendment 10.....11, 14, 20, 25, 29
Amendment 11.....11, 13, 15, 25, 28, 29, 51, 64

United States Statutes
42 U.S.C. 1983.....38, 40, 42, 52, 64, 65

United States Supreme Court Rules
Rule 37.3.....2

TEXTS

Black's Law Dictionary, Revised 4th Ed.....3, 34

D'Souza, Dinesh, The Catholic Classics (1989: Our Sunday Visitor).....47

Howard, Thomas, Chance or the Dance, A Critique of Modern Secularism (Ignatius Press, 15 Oakland Ave., Harrison, N.Y. 10528).....46

Stern, Gressman, and Shapiro, Supreme Court Practice (6th Ed.).....7

IN THE

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana: LINLEY E. PEARSON, Attorney General of Indiana, and INDIANA ALCOHOLIC BEVERAGE COMMISSION,

Petitioners.

vs.

GLEN THEATRE, INC., *et al.*; DARLENE MILLER, *et al.*; and CIVIL CITY OF SOUTH BEND, *et al.*.

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

AMICUS CURIAE BRIEF OF JAMES J. CLANCY, ATTORNEY AT LAW, IN SUPPORT OF NEITHER PETITIONERS NOR RESPONDENTS

This Amicus Curiae Brief in Support of Neither Petitioners nor Respondents is being filed pursuant to Rule 37.3 of the Supreme Court. Written consent of the parties will be filed with this Court concurrently with this Brief.

INTEREST OF AMICUS CURIAE

Amicus Curiae James J. Clancy is a Los Angeles attorney admitted to practice in this Court in 1972 pursuant to the Motion and recommendation of Charles H Keating, Jr. Amicus is also a member of the Roman Catholic faith and the Los Angeles Archdiocese Commission on Obscenity and Pornography recently formed by Archbishop Roger Mahony.

At the present time, Amicus is providing pro bono legal services to Linda Marchiano (who appeared in pornographic films under the name "Linda Lovelace") and the parents of the late Colleen Applegate (who appeared in pornographic films under the name "Shauna Grant") in their efforts: (1) to void the federal copyrights under which the federal government has been granting benefits to the producers of obscene video tapes such as "Deep Throat" and "Virginia," and (2) to suppress and terminate the re-broadcasts

of the malum in se acts of public indecency[1] performed in the past by pornographic actors and actresses during the filming of such "copyrighted" obscene motion pictures films (now indelibly recorded on the master negative and positive print copies of such "copyrighted" films)[2], which are being used daily for continuous and repetitive re-broadcast in violation of

---

1/ Black's Law Dictionary, Revised 4th Ed., defines "malum in se" as: "Malum in se. A wrong in itself; an act or case involving illegality from the very nature of the transaction, upon principles of natural, moral, and public law. Story, Ag. section 346. State v. Shedoudy, 45 N.M. 516, 118 P.2d 280, 287."

2/ See Appendix "I" to this Brief, containing the contentions of Amicus Curiae James J. Clancy in Petition for Writ of Certiorari in James J. Clancy, et al. v. Jartech, Inc., et al, No. 81-2094, October Term 1981 at Subject Index, pages 1-36, fn. 3 at page 36, and 63-64, petition denied in 459 U.S. 826, 74 L.Ed.2d 62, 103 S.Ct. 58 (October 4, 1982); 459 U.S. 879, 74 L.Ed.2d 143, 103 S.Ct. 175 (October 4, 1982); 459 U.S. 1058, 74 L.Ed.2d 624, 103 S.Ct. 477 (November 29, 1982).

state and federal public indecency and state and federal public nuisance laws. Linda Marchiano participated as "Linda Lovelace" in the filming of the notorious hard-core pornographic film "Deep Throat," and Colleen Applegate performed as "Shauna Grant" in the filming of "Virginia," an equally notorious hard-core pornographic film which introduced one of the first of what has since become a burgeoning flood of obscene films depicting the theme of incest, in which the central film characters "act out" incestuous sexual relations involving hard-core sex acts, graphically depicted, between father and daughter. The interests of Linda Marchiano (a.k.a. "Linda Lovelace") and the parents of Colleen Applegate (a.k.a. "Shauna Grant") will be affected by what this court says regarding the powers of individual state governments to regulate malum in se acts of public indecency (see footnote 1 on page 3, supra) which

are portrayed in public, either live in three dimension, or on motion picture film in two dimension form.

Approximately thirty years ago, while engaged as a Deputy City Attorney, in Burbank, California in the defense of complicated eminent domain proceedings, Amicus was given the additional burden of defending a mandamus writ seeking the return of 400,000 hard-core pornographic paperbacks, seized under a search warrant, which had been printed, bound and warehoused in Burbank by an individual who was under indictment in Alameda County, California for the crime of conspiracy to manufacture obscene paperbacks. After this introduction to the pornographic trade and an unsuccessful defense of that case, Amicus was asked to prepare a tract for the League of California Cities, in which he expressed his personal concern for the manner in which this legal problem was being treated in the

Courtrooms throughout the United States.

A copy of that tract on "obscenity" [3] reached Charles H Keating, Jr., the founder of Citizens for Decency Through Law, who succeeded in convincing Amicus that he should use his legal talent to assist members of law enforcement and those members of the general public who were similarly concerned with the judicial treatment being accorded conduct involving "public indecency" and "obscenity," including situations where a claim was being made by the pornographic trade that, as in this case, such proscribed conduct when performed as part of a motion picture film, book, performance, etc.: (1)

---

[3] A copy of that tract is being lodged with the Clerk of this Court. The Burbank-Aday case in the Burbank Municipal Court, S. 114, is discussed at page 67 of the tract and is reported as Aday v. Municipal Court for Burbank Judicial Dist. (1962, 2d Dist.) 210 Cal.App.2d 229, 26 Cal.Rptr. 576.

constituted "expression" which is protected by the First Amendment to the federal Constitution, and (2) cannot be regulated by the police power of the State except by proving that the film, book, performance, etc., itself is "obscene." See Appendix B to this Brief at pp. 5-18. Due largely to the prudent and dedicated leadership of Charles H Keating, Jr., amicus was thereafter afforded a unique opportunity during the 27 year period from 1963-1990, to express that concern to this Court as the co-author of amicus curiae briefs or counsel of record and author of briefs and other pleadings filed in over 56 cases which reached the docket of this Court. A list of those 56 cases is set forth at Appendix A-9 through A-14 to this brief.

Amicus requests the members of this Court to take judicial notice of the records of this Court [see Supreme Court Practice, by Stern, Gressman, and

Shapiro, Sixth Edition, at section 12.11 on p. 540] and arguments on improper federal interference, which challenge federal (subject matter) jurisdiction and support the tenth amendment (police power) and the eleventh amendment (right to have important state interests adjudicated in a state court), appearing in the cases described in Appendix A of this brief, in the context in which they were made, insofar as they specifically address the Constitutional questions which are now before this Court in its grant of a writ of certiorari.. Amicus has made reference to such records and relies upon the same in his arguments in this brief. See also: Appendix B through H of this brief which contains a copy of the following pleadings in certain of those cases, for reference by the members of this Court and Counsel of Record herein:

1. Motion to Affirm of Appellee

Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at pp. 1-26. See copy at Appendix "B" to this Brief. See also: State of Ohio ex rel. Keating v. A Motion Picture Film Entitled "Vixen" et al., 27 Ohio St.2d 278, 56 Ohio Ops.2d 165, 272 N.E.2d 139, vacated and remanded on other grounds in A Motion Picture Film Entitled "Vixen" et al. v. Ohio ex rel. Keating (71-599) 413 U.S. 905, 37 L.Ed.2d 1016, 93 S.Ct. 3033 (June 25, 1973), opinion adhered to on remand in 35 Ohio St.2d 215, 301 N.E.2d 880.

2. Supplemental Brief in Support of Motion to Affirm of Appellee Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at pp. 1-17. See copy at Appendix "C" to this Brief.

3. Brief Amicus Curiae of Charles H Keating, Jr. in Support of Respondent's Petition for Rehearing in Rabe v. State of Washington, October Term, 1971, No. 71-247. See copy at Appendix "D" to this Brief. See also, Rabe v. State of Washington, 405 U.S. 313, 31 L.Ed.2d 258, 92 S.Ct. 993, reh. den. 406 U.S. 911, 31 L.Ed.2d 822, 92 S.Ct. 1604 (Mar. 20, 1972), and the dissent of Burger and Rehnquist in 405 U.S. at 317-318.

4. Petition for Rehearing of Appellee Charles H Keating, Jr. in A Motion Picture Film Entitled "Vixen," Russ Meyer, Eve Productions, Inc., Malibu, Inc., and Clarence P. Gall v. State of Ohio ex rel Charles H Keating, Jr., October Term, 1971, No. 71-599, at Subject Index and pp. 1-19. See copy at Appendix "E" to this Brief.

5. Jurisdictional Statement of Appellants Huffman et al. in Huffman v. Pursue, Ltd., October Term, 1973, No. 73-296, at Subject Index and pp. 1-31. See copy at Appendix "F" to this Brief. See also, 415 U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (1974) which noted jurisdiction as to all questions without limitation. See Supreme Court Practice, Stern, Gressman, Shapiro, Sixth Edition at p. 299, "Without such limitation, the order noting probable jurisdiction permits briefing and arguments on all questions properly raised by the parties;" and 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200 (1975), reh. den. 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969.

6. Petition for Rehearing of Appellants Huffman et al. in Huffman v. Pursue, Ltd., October Term, 1973, No. 73-296, at Subject Index and pp. 1-28. See copy at Appendix "G" to this Brief.

7. Petition for Rehearing of Petitioner in People of the State of California ex rel. Cooper, City Attorney of the City of Santa Ana, California v. Mitchell Brothers' Santa Ana Theater, et al., October Term, 1985, No. 85-439, at Subject

Index and pp. 1-16. See Copy at Appendix "H" to this Brief.

STATEMENT OF FACTS

Amicus adopts as his own the Statement of Petitioners at pages 3-9 of the Brief for Petitioners, which is set forth at Appendix A-1 through A-7 to this Brief, and supplements the same with one additional fact; namely, that at the outset of the trial in 1985, U.S. District Judge Allen Sharp rejected a "Huffman" challenge to federal (subject matter) jurisdiction, see Glen Theatre v. Civil City of South Bend, 726 F.Supp. 728 (1985) at 730, which, in the view of this Amicus, is never waived and constitutes reversible error under the 9th, 10th, and 11th Amendments to the United States Constitution.

STATEMENT OF THE CASE (ISSUES)

During the past 27 years, Amicus has repeatedly attempted, without success, to get a majority of this

Court's membership to require the Court as a whole to examine the two fundamental issues which, for the first time, are now squarely before this Court; namely, (1) whether a state statute,[4/] such as a public indecency or a moral public nuisance abatement statute, which on its face constitutes a proper exercise of a state's police power to regulate sexual conduct in

---

[4/] The "common law" right to proscribe lewd conduct as "public indecency" predates the federal constitution and the First Amendment and stems from the Common Law Crime, first recognized as a separate offense in 1663 when Sir Charles Sedley was brought before the common law courts on a breach of the peace charge for "exposing" himself in the nude on the balcony of a tavern in Covent Garden, England, 1 Sid 1688. Common law crimes rested upon general reception and usage and were established by showing that it always had been the custom in the community to observe the standard of conduct which had been violated. On that occasion, Sedley urinated onto the courtyard below and delivered an obscene and blasphemous speech. In that case, the common law courts declared Sedley's conduct to be a common law crime which is now codified in Indiana's public indecency statute.

public, involves a sovereign right which, under the eleventh amendment, may not be interfered with by the federal courts; and (2) whether, given the additional factors that the important state interest here involves the tenth amendment (state sovereignty) and the eleventh amendment (right to have such issue tried in the state courts), the jurisdiction to inquire into the constitutionality of a statute of this type (which has been determined to be facially constitutional), as applied to the specific conduct of an individual, is exclusively in the state courts and is not subject to the Ex Parte Young, 209 U.S. 123 (1908) fiction, and may not be interfered with by a federal court under a First Amendment claim that such proscribed sexual conduct and the portrayal thereof is no longer subject to that sovereign power because it is made under a claim that it is "expressive speech" under the First

Amendment to the Federal Constitution.

SUMMARY OF ARGUMENT

Amicus contends that the answers to the above claims are: (1) The right of a state to regulate sexual conduct in public is a fundamental "natural law," and "common law" right enjoyed by the citizens of every town, village, county and city, such as South Bend, Indiana, and collectively, is possessed by the individual state governments, which has existed from time immemorial and certainly long before the enactment of the First Amendment to the Federal Constitution, and was preserved and reserved to the States under the Ninth and Tenth Amendments; and (2) Jurisdiction to interpret and apply the meaning and scope of a state statute regulating sexual conduct in public, which is facially valid, to specific conduct of an individual, is exclusively in the state courts, is a preemptive

matter of state sovereignty which is guaranteed by the Eleventh Amendment and is not subject to the Ex Parte Young fiction, see pages 28-29, infra, which does not depend upon whether there is an ongoing state judicial proceeding, and may not be interfered with by a federal court.

The federal complaint and proof adduced below is the same type of collateral attack on the Indiana Supreme Court's definitive interpretation and judgment in Indiana v. Baysinger, 397 N.E.2d 580 (Ind. 1980) (re "nude dancing") as the collateral attack on the Ohio Common Pleas (trial court) ruling and judgment on "closure" in Huffman v. Pursue, Ltd., 420 U.S. 592, at 612. See Point III(H)(1) "The Huffman Appeal (Civil Case)," infra, at pp. 51-56, and the further discussion at pages 24-25.

A subsidary question, not previously addressed in the briefs in

the above described 56 cases, relates to the role of the federal trial court if this Court holds that the trial facts negate federal jurisdiction and preclude federal interference, i.e. whether trial Judge Allen Sharp's findings of fact and conclusions of law on the issue of law not answered by the Indiana Supreme Court in Indiana v. Baysinger, 397 N.E.2d 580 (Ind. 1980), appearing at 695 F.Supp. 414, at 419, which are outside Judge Sharp's limited jurisdiction (i.e. "jurisdiction to determine jurisdiction"), must be vacated for lack of jurisdiction and failure to state a federal claim upon which relief can be based.

Amicus contends that, in view of the South Bend, Indiana's Huffman challenge to basic federal (subject matter) jurisdiction which is never waived, Judge Sharp's findings of fact and conclusions of law do constitute an unconstitutional interference with the

Indiana Supreme Court's exclusive right to make a determination of the meaning and application of the statute to these specific facts. However, his findings of fact and conclusions of law are relevant in the sense that they negate federal (subject matter) jurisdiction. Succinctly, the federal court, in examining the pleadings and proof in relation to its "jurisdiction to determine jurisdiction," can determine abstractly on that limited jurisdictional issue that Plaintiffs' strip-teasing, as a matter of law, is malum in se "conduct" and does not and cannot constitute "expressive" speech, and that any state public indecency statute (which codifies the law expressed in 1663 in Sir Charles Sedlys Case) can be applied to proscribe the strip-tease dance appearing in the video tape, herein stipulated to by the parties, without offending the federal constitution.

ARGUMENT

I

THE RIGHT OF A STATE TO ADDRESS AND REGULATE SEXUAL CONDUCT IN PUBLIC IS A FUNDAMENTAL RIGHT, ENJOYED BY THE CITIZENS OF EVERY TOWN, CITY, VILLAGE, ETC. THE POWER TO ENFORCE THOSE RIGHTS WHICH ARE COLLECTIVELY POSSESSED BY BY THE INDIVIDUAL STATE GOVERNMENTS, EXISTED LONG BEFORE, AND WAS NOT AFFECTED BY, THE ENACTMENT OF THE FIRST AMENDMENT TO THE FEDERAL CONSTITUTION.

The correctness of the above proposition of law is so basic as to require no citation of authority other than the concession of Mr. Justice Douglas, speaking in his dissenting opinion in Alberts v. California, 354 U.S. 476 at 512. See, in this regard, the analysis of United State Court of Appeals Judge Bowman, speaking for a plurality of the Eighth Circuit (Bowman, Dumbauld and Lay) which, in Walker Jr. v. City of Kansas City, Missouri, 911 F.2d 80 at 86 (CA 8, 1990), came to a conclusion contrary to the en banc decision of the Seventh Circuit below in

Miller v. Civil City of South Bend, 904 F.2d 1081 (CA 7, 1990). There, Circuit Judge Bowman held at pages 86:

> "Even Justice Douglas--famous for his dissents in many First Amendment cases (including each of the cases quoted above) in which he asserted that any number of pornographic items constituted protected speech [fn. omitted] --apparently would have drawn the line at 'exotic' dancing. Thus, he wrote: 'I assume there is nothing in the Constitution which forbids Congress from ... proscrib[ing] conduct on the grounds of good morals. No one would suggest that the First Amendment permits nudity in public places....' Roth v. United States, 354 U.S. 476, 512, 77 S.Ct. 1304, 1323, 1 L.Ed.2d 1498 (1957) (Douglas, J., dissenting) (emphasis added to second sentence). In a later case -- and later dissent -- Justice Douglas noted the historical roots of the distinction he drew between sexually explicit -- indeed obscene -- literature and actual people shedding their clothes in public places:
>
> > The first reported case involving obscene conduct was not until 1663. There, the defendant was fined for 'shewing himself naked in a balkony, and throwing down bottles (pist in) vi & armis among the people in Covent Garden, contra pacem, and to the scandal of the Government.' Sir Charles Sydleys Case, 83 Eng.Rep. 1146-1147 (K.B. 1663). Rather

than being a fountainhead for a body of law proscribing obscene literature, later courts viewed this case simply as an instance of assault, criminal breach of the peace, or indecent exposure. E.g., Bradlaugh v. Queen, L.R. 3 Q.B. 569, 634 (1878); Rex v. Curl, 93 Eng.Rep. 849, 851 (K.B. 1727) (Fortescue, J., dissenting).

United States v. 12 200-Ft. Reels of Super 8 mm. Film, 413 U.S. 123, 134, 93 S.Ct. 2665, 2672, 37 L.Ed.2d 500 (1973) (Douglas, J., dissenting). If there is a distinction between Sir Charles's disrobing and the go-go girls' performance at the Last Chance Lounge, it at least cannot be said that that distinction lies in the lack of expressiveness of Sir Charles's conduct." (Our emphasis.)

Sir Charles Sedleys Case became a part of the English Common Law in 1663, and was followed as a part of the Common Law in America at the time the United States Constitution became law. No one has ever argued that an attempt was made to overrule Sedley's case; rather the general understanding is that such power was reserved to the states and the people in the adoption of the Ninth and Tenth Amendments. See, in this regard,

the dissenting opinion of Circuit Judge Easterbrook below in Miller v. Civil City of South Bend, supra, at page 1124:

"The First Amendment protects 'the freedom of speech'. Go-go dancing is not 'speech'. James Madison would have guffawed had anyone suggested public nudity as an example of 'freedom of speech' -- or of anything that could be derived from the Framers' conception by a series of plausible interpretations. Parading in a state of undress is conduct, not speech. Even Justices Black and Douglas, who thought the First Amendment absolute, rendering all efforts to curtail obscene speech unconstitutional, drew the line here .... What these absolutists gave as a reductio ad absurdum, the court today holds the First Amendment commands." (Our emphasis.)

II
INDIANA CODE 35-45-4-1 IS CONSTITUTIONAL ON ITS FACE AS A MATTER OF LAW.

In State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580, at 583 (1980), the defendants claimed that their activity, "appearing nude in bars and taverns and nude dancing in bars" was entitled to First Amendment protection. There, the Indiana Supreme Court interpreted

Indiana Code 35-45-4-1 (see copy at Appendix A-1) as nothing more than a codification of Sir Charles Sedleys Case, supra, which required proof that the "nudity" be "conduct which traditionally has been held to be public indecency":

> "Under our statutes and case law, public nudity itself, regardless of a showing of obscenity, and without requiring proof of obscenity, is conduct which traditionally has been held to be public indecency, which is within the power of the legislature to prohibit. There is no right to appear nude in public. Rather, it may be constitutionally required to tolerate or to allow some nudity as part of some larger form of expression meriting protection, when the communication of ideas is involved. A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance as presented in these cases is simply conduct or is expression entitled to First Amendment protection. In the cases before us it is clear the activity involved is appearing nude or dancing in the nude in bars and is conduct. Appellees make no claim that there is any pure speech involved in their appearances. They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude. This is a claim for some kind of right to appear nude in public and in this contest. This activity is conduct, not speech, and as such, this claim does not rise to the level of a First Amendment claim. The governmental interest in prohibiting conduct that has long been recognized as public indecency is unrelated to the suppression of free speech. Our case law has restricted and defined the type of conduct which has been prosecuted under public indecency statutes. Our statutes provide for procedures and standards to be used in a determination of obscenity when required for different materials or performances." (Our emphasis.)

Where, as here, the validity of a statute has been sustained by a State Court in the face of federal objections, this Court, on appeal, must accept the state court's construction and test the validity on that basis. General Trust Company v. Blodgett, 287 U.S. 509, 513; Kingsley Pictures Corp. v. Regents, 368 U.S. 684, 688. The appeal to this Court in Baysinger, supra, was dismissed for

want of a substantial federal question. State v. Baysinger et al., sub. nom. Clark v. Indiana, 446 U.S. 937 (1980). According to Hicks v. Miranda, 422 U.S. 332 (1975), this Court's dismissal of the Baysinger appeal for want of a substantial federal question must, at the very least, be construed as a ruling on the merits that Indiana Code 35-45-4-1 is facially constitutional.

Further, the federal complaint and proof adduced below is clearly an unconstitutional collateral attack on the Indiana Supreme court's above ruling in Baysinger, supra. See Huffman v. Pursue, Ltd., 420 U.S. 592 at 612. Although it is argued that Plaintiffs' claim of free speech protection provides a "difference" (which allegation was not made in Baysinger), Plaintiffs provided no proof whatsoever in support of that allegation. The difference between the pleading and proof in Baysinger and the pleading and proof hereinbelow is

without distinction.

At the time they filed their federal complaint, Plaintiffs' knew, as Amicus has argued herein at pages 15 that, as to any state court action and their pleading and proof, they would be concluded by Baysinger, supra. To avoid that result, they brought this federal action as a collateral attack on Baysinger. Huffman is an absolute bar, even though there is no pending state proceeding. To hold otherwise would instruct all litigants on "how" to thumb their noses at the Eleventh Amendment and avoid the rule of law expressed in Huffman.

III

THE CITY OF SOUTH BEND, INDIANA, "HUFFMAN" CHALLENGE IN THE TRIAL COURT INVOKED FOUR BASIC JURISDICTIONAL PRINCIPLES OF LAW WHICH ARE NEVER WAIVED: (1) LACK OF FEDERAL (SUBJECT MATTER) JURISDICTION; (2) FAILURE TO STATE A CLAIM ("SUBJECT MATTER") UPON WHICH RELIEF CAN BE BASED; (3) STATE SOVEREIGNTY - POLICE POWER (10TH AMENDMENT); AND (4) RIGHT TO BE SUED ONLY IN STATE COURT (11TH AMENDMENT), ALL OF WHICH WERE VIOLATED BY THE COURT OF APPEALS

ORDER OF REMAND TO THE UNITED STATES DISTRICT COURT IN 1982.

III(A). THE 1986 COURT OF APPEALS RULING THAT THE INDIANA PUBLIC INDECENCY STATUTE WAS FACIALLY CONSTITUTIONAL IS CORRECT.

That part of the 1986 Court of Appeals judgment in Glen Theatres, Inc. v. Pearson, 802 F.2d 287 (CA7 1986) (Cummings, Easterbrook, and Norris) which upheld the Indiana public indecency statute as facially constitutional under the Indiana Supreme Court's definitive interpretation in State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1980), thereby annuling the finding of a likelihood of success on Plaintiffs' claim of facial unconstitutionality, upon which trial Judge Sharp had granted the injunction [see 722 F.Supp. 728 at 731 (July 26, 1985)], was correct.

III(B). THE 1986 COURT OF APPEALS REMAND OF THE CASE TO THE UNITED STATES DISTRICT COURT, WITHOUT INSTRUCTIONS THAT THE PLAINTIFFS HAVE THE BURDEN OF PROOF AND MUST PLEAD AND PROVE THE HUFFMAN EXCEPTION FOR

FEDERAL (SUBJECT MATTER) JURISDICTION WAS REVERSIBLE ERROR.

However, the remainder of the Court of Appeals' judgment, which remanded the federal civil rights lawsuit back to the trial court for trial of the "as applied" constitutional issue, without any instructions on what to do with the plaintiffs' burden of proof under Huffman v. Pursue, Ltd. 420 U.S. 592 at 19, to meet the jurisdictional requirement of proving "extraordinary circumstances where the danger of irreparable loss is both great and immediate," was clear error. At a minimum, it was reversible error in 1986, in the face of the City of South Bend, Indiana's jurisdictional challenge under the Younger-Huffman abstention doctrine, see 726 F.Supp. at 730 (1985), to order Federal Judge Sharp to go forward on the "as applied" trial without instructions that he must first find, under his "jurisdiction to

determine jurisdiction" function, the requisite "extraordinary circumstances where the danger of irreparable loss is both great and immediate," pursuant to this Court's ruling in Huffman v. Pursue, Ltd., supra at 612, as authoritatively construed by this Court the previous year in Pennzoil Co. v. Texaco, Inc., 481 U.S. 1 at 14-17 (1985).

Further, federal jurisdiction in such cases is dependent upon the "fiction" created in Ex Parte Young, see pages 14-15, supra, that the Attorney-General is violating the constitution and, thus, the lawsuit is against a private individual rather than against the state in violation of the Eleventh Amendment. When the federal court entered its 1986 judgment that the Indiana Indecency Statute was susceptible of a constitutional interpretation and was facially constitutional, the "fiction" of Ex

Parte Young was dispelled and the jurisdiction of the federal court was exhausted. At that point, the federal court was under the constraints imposed by the Tenth and Eleventh Amendments and had no power to "stay" its lack of jurisdiction and was required to dismiss the lawsuit.

III(C) UNDER ITS DE NOVO REVIEW, THE COURT OF APPEALS IN 1986 SHOULD HAVE RECOGNIZED THAT PLAINTIFFS' CLAIM, THAT "STRIP TEASING" WAS "EXPRESSIVE CONDUCT" WHICH WAS PROTECTED BY THE FIRST AMENDMENT, WAS A SHAM, AND SHOULD HAVE DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM UPON WHICH FEDERAL RELIEF COULD BE GRANTED.

The video tape (see Appendix A-5 to this brief at fn. 2) which was before the Court of Appeals in 1986 is patent that Plaintiffs' claim was spurious as a matter of law. Plaintiffs' claim that such "nude barroom dancing" was "expressive speech" under the federal constitution is no different that the claim regarding "appearing nude or

performing a nude dance" ... which was proscribed in Baysinger, supra, see pages 21-25, supra, and their success in the Seventh Circuit Court of Appeals En Banc decision, is analogous to the claim of the shrewd tailors in Hans Christian Anderson's tale of the vain Emperor in the "Emperor's New Clothes," where the tailors claimed they possessed an exquisite, invisible cloth from which they could tailor the finest suit of clothes in the kingdom - which all would recognize except fools and those who could not do their jobs. Plaintiff's complaint and the proof adduced thereunder is clearly a collateral attack on Baysinger, supra, and this Court's opinion in Huffman, supra, is controlling.

Under de novo review, see World Famous Drinking Emporium v. City of Tempe, 820 F.2d 1079 (9th Cir. 1987), at 1081, the Seventh Circuit should have ruled that under Huffman, State

Sovereignty was the central issue and should either have dismissed the Civil Rights lawsuit or ordered the Plaintiffs to file their lawsuit in the State Court.

This Court in Dallas v. Stanglin, ___U.S.___, 104 L.Ed.2d 18, 109 S.Ct. 1591 (1989) has held that social dancing (with clothes) is not "expressive activity...protected by the First Amendment." A fortiori, nude barroom dancing (without clothes) must not be protected. See Judge Easterbrook's dissenting opinion below in 904 F.2d at 1128 and 1129, and Circuit Judge Bowman's opinion in Walker Jr. v. City of Kansas City, Mo., 911 F.2d 80 at 89 (CA 8, 1990):

> "While the precise sort of dancing at issue in Stanglin was ballroom rather than 'go-go' dancing, it turns the Supreme Court's First Amendment rulings on their heads to maintain that an activity unprotected by the First Amendment when the participants are clothed acquires exalted status under that amendment if the participants shed their clothes.

> See, e.g. Young v. American Mini Theatres, 427 U.S. 50, 61, 96 S.Ct. 2440, 2447-48, 49 L.Ed.2d 310 (1976) ('[T]here is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression ....'). Indeed, as Judge Easterbrook has noted:
>
> > 'A line that distinguishes barroom dancing (protected) from ballroom dancing (unprotected) has little virtue other than avoiding inconvenient precedent such as Stanglin.'"

Continuing with that same line of reasoning, if under Baysinger, supra, "appearing nude or nude dancing" in a barroom is unprotected, then a fortiori, "appearing nude or nude dancing" with the added feature of "strip-tease" must also be unprotected.

In such an "as applied" case, United States v. O'Brien is not apposite, for a number of reasons: (1) O'Brien dealt with the facial validity of a federal statute which was under attack; here, the state statute has been declared to be constitutional on its face, in which case, the federal court's

examination and analysis of the constitutionality is limited to the concrete case before the Court. See Circuit Court of Appeals Judge Coffey's dissenting opinion in 904 F.2d at pp. 1114-1115:

> "We are concerned with an Indiana public nudity statute that has been declared valid on its face. State v. Baysinger, 272 Ind. 236, 397 N.E.2d 580 (1979), appeal dismissed for want of a substantial federal question, 446 U.S. 931, 100 S.Ct. 2146, 64 L.Ed.2d 783 (1980). In a previous opinion we recognized the Baysinger holding as authoritative for purposes of this litigation. Glen Theatre, Inc. v. Pearson, 802 F.2d 287, 288-90 (7th Cir. 1986). Thus, this is an 'as applied' challenge where we are concerned only with the statute's application to the plaintiffs' activities. Therefore, we must 'limit our analysis of the constitutionality of the [statute] to the concrete case before us.' Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 803, 104 S.Ct. 2118, 2127, 80 L.Ed.2d 772 (1984), and speculation concerning whether or not the state might enforce this statute if the routines were 'choreographed as part of a graduate Ph.D. thesis.' Majority Opinion at 1087 [footnote omitted], if the nudity was in a 'movie,' Posner concurrence at 1104, or in 'belly dancing,' id., is simply irrelevant .... Where, as here, the only concrete example of

> enforcement of the statute contained in the record involves the conduct of the plaintiffs, we are limited solely to consideration of whether their activities are constitutionally protected from the prohibition of public nudity contained in Indiana's facially valid statute. See Vincent, 466 U.S. at 803, 104 S.Ct. at 2127 [footnote omitted];

and (2) O'Brien involved conduct [burning of a draft card] which was merely malum prohibitum.[5/] Here, the conduct -- indecent exposure of one's body -- was a crime at common law, and uniformly throughout the 50 States is malum in se. City Court of Tucson v. Law, 16 Az. 12.

5/ Black's Law Dictionary, Revised, 4th Ed., defines "malum prohibitum" as: "Malum Prohibitum. a wrong prohibited; a thing which is wrong because prohibited; an act which is not inherently immoral, but becomes so because its commission is expressly forbidden by positive law; an act involving an illegality resulting from positive law. Contrasted with malum in se. Story, Ag. section 346; People v. Pavlic, 227 Mich. 562, 199 N.W. 373, 374, 35 A.L.R. 741." Compare fn. 2 on page 4, supra.

III(D). THE 1986 COURT OF APPEALS MISUNDERSTANDING OF HUFFMAN CAN BE TRACED TO THIS COURT'S REFUSAL IN THE LAST PARAGRAPH OF THE HUFFMAN OPINION TO EXPLAIN MORE CLEARLY THE BASIS FOR ITS INSTRUCTIONS TO THE TRIAL COURT UPON REMAND.

The above error was not so much the fault of the Court of Appeals as it was the failure of this Court to clearly articulate in its opinion ten years earlier in Huffman v. Pursue, Ltd, (1975), supra, that lack of "subject matter" jurisdiction based upon State Sovereignty and the 11th Amendment was the realistic basis of its decision. Although appellant made "subject matter" jurisdiction the primary issue of Appellant's Jurisdictional Statement in Huffman v. Pursue, Ltd., and in the Brief on the Merits and at oral argument, and this Court was under a Constitutional duty to resolve that issue on Appeal (as distinguished from its review under a writ of certiorari), this Court in 1975 refused to address

those contentions. The only clue that federal jurisdiction was the central issue was this Court's concluding paragraph in Huffman, 420 U.S. 592 at 612 (Mar. 18, 1975):

> "We therefore think that this case is appropriate for remand so that the district court may consider whether...the district court may assume jurisdiction under an exception to the policy against federal judicial interference with state court proceedings of this kind.

It took 10 years of additional litigation to get the members of this recalcitrant Court to clear the air. See the dissenting opinion of Stewart in Juidice v. Vail, 430 U.S. 327, 348, 51 L.Ed.2d 376, 97 S.Ct. 1211 (Mar. 22, 1977); Trainor v. Hernandez, 431 U.S. 434, 52 L.Ed.2d 486, 496, 97 S.Ct. 1911 (May 31, 1977); Moore v. Sims, 442 U.S. 415, 430, 60 L.Ed.2d 994, 1007, 99 S.Ct. 2371 (June 11, 1979); Middlesex County Ethics Committee etc. v. Garden State Bar Assn. et al., 457 U.S. 423, 73 L.Ed.2d 116, at 124-125, 102 S.Ct. 2515

(June 21, 1982) ["extraordinary circumstances": (1) ongoing state judicial proceeding; (2) do proceedings implicate important state interests; and (3) adequate opportunity in state proceedings to raise constitutional challenge]; see also Pennzoil Co. V. Texaco, Inc., 481 U.S. 1, at 14-17, 95 L.Ed.2d 1, at 18-20, 107 S.Ct. 1519, where this Court has given its most definitive ruling on Huffman.

III(E). IN A PROPER CASE, AS HERE, THERE IS NO REQUIREMENT UNDER THE HUFFMAN PRECEDENT FOR A PENDANT STATE PROCEEDINGS.

In Pennzoil Co. v. Texaco, Inc., supra, this Court noted that there is no absolute need for a pending state proceedings, and concluded, that, as of December 10, 1985, the following principle of law governed (at footnote 9, on page 16):

> "9. In some cases, the probability that any federal adjudication would be effectively advisory is so great that this concern alone is sufficienty to justify abstention, even if there

> are no pending state proceedings in which the question could be raised. See Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496, 85 L.Ed.2d 971, 61 S.Ct. 643 (1941).

Because this case only involves an "as applied" constitutional claim and is limited to the probative facts (the particular striptease) before the Court, Plaintiffs cannot say that they have stated a valid Constitutional claim under the Civil Rights Act upon which relief can be based. A federal adjudication on these facts would accomplish no more than a criminal trial of the alleged violation in the State Court. Further, a slight variation of the dance might result in a different verdict on the criminal trial.

There is still a great deal of confusion, which requires clarification, as to what is required by Huffman v. Pursue, Ltd. and in which cases it must be applied. See, for example, the concurring opinion of Associate Justice Kennedy in 1987, then sitting on the

Court of Appeals for the Ninth Circuit in World Famous Drinking Emporium, Inc. v. City of Tempe, 820 F.2d 1079 at 1084 (CA 9, June 26, 1987):

> KENNEDY, Circuit Judge, concurring: "General principles of abstention are distinct from the doctrine of dismissal for lack of jurisdiction pursuant to Younger v. Harris, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971), and Huffman v. Pursue, Ltd., 420 U.S. 592, 95 S.Ct. 1200 (1975). Only the latter rule is applicable here, and Huffman squarely controls. I concur in the judgment [of dismissal].

III(F). FROM A "PLEADING" STANDPOINT, PLAINTIFFS HAVE FAILED TO PLEAD AND PROVE THE "EXCEPTION" FOR FEDERAL JURISDICTION TO ATTACH.

The pleadings and proof herein demonstrate that "subject matter" jurisdiction does not lie because the Plaintiffs have not stated a civil rights claim upon which federal relief can be based. Martinez v. California, 444 U.S. 277 (1980).

Under the rationale expressed in Allen v. McCurry, 449 U.S. 90 (1980), and Parratt v. Taylor, 451 U.S. 527

(1981), the intent of Congress was to establish federal jurisdiction under 42 U.S.C. Section 1983 where one of the following

three circumstances is shown to exist:

(1) The State substantive law is facially and totally unconstitutional;

(2) The State procedural law is inadequate to allow full litigation of a constitutional claim; or

(3) The State procedural law, though adequate in theory is inadequate in practice.

In this case, none of the foregoing circumstances apply. The Indiana state law is not facially unconstitutional, and the procedural law of the State of Indiana is entirely adequate to allow full litigation of all constitutional claims.

In their effort to avoid Huffman, supra, plaintiffs cannot claim that every litigant asserting a 42 U.S.C. Section 1983 federal right is entitled

to one unencumbered opportunity to litigate the federal right in a federal district court. See Allen, et al. v. McCurry, 449 U.S. 90 at 103 and 105.

As suggested by United States District Court Judge Young's analysis of Parratt, supra., in Juncker v. Tinney III, 549 F.Supp. 574, the jurisdictional question may ... be ... whether the plaintiffs have established "subject matter" jurisdiction; i.e. stated a claim upon which relief can be based, at p. 578:

> "The argument for applying Parratt to liberty and life interest (and thus for sending many purported section 1983 cases to state court) is based not upon principles of comity but upon the language of the Fourteenth Amendment and upon the concept that in certain situations a complaint fails to state a claim under the Fourteenth Amendment because the plaintiff has not been deprived of a constitutional right without due process of law. Proof of this difference lies in the different results. Under an exhaustion requirement, a plaintiff may sue in federal court after he has exhausted his state remedies. Under the Parratt analysis, if a plaintiff fails to state a claim

> under section 1983, he has no cause of action in federal court, and may sue only in state court." (Our emphasis)."

In Vickory v. Walton, 721 F.2d 1062 (CA 6th, Nov. 30, 1983), petition for a writ of certiorari denied by this Court, the Court of Appeals undertook an analysis of Parratt, supra, and held the plaintiff must plead and prove the jurisdictional requirement that the state remedies for redressing the wrong were inadequate and that, in a procedural due process case under 42 U.S.C. Section 1983, plaintiff must attack both the state corrective procedure (judicial process) as well as the substantive wrong (application of the statute to Plaintiffs by administrative officials - here, police officials), and that the plaintiff had neither alleged nor shown any significant deficiency of the state remedy. See, also, Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, at 14, where

this Court noted that "the burden on this point rests on the federal plaintiff to show "that state procedural law barred presentation of its claims" ... and at page 16, where the Court stated: "Texaco has cited no statute or case clearly indicating that Texas Courts lack such power. Accordingly, Texaco has failed to meet its burden on this point." (Our emphasis.)

Applying Vickory v. Walton to the pleadings and proof in this case, Defendants have established that the administrative officials, under the Indiana Supreme Court's ruling in Baysinger, supra, would apply the statute to their nude (strip-tease) dance, but they have not shown, nor could they show, that Plaintiffs' would not be able to raise their constitutional claim in a similar state court action. Martinez v. California, 444 U.S. 277 at 285 (1980).

III(G) THERE ARE VALID PUBLIC POLICY REASONS WHY, IN VIEW OF THE "STATE SOVEREIGNTY" CONSIDERATION, THE JURISDICTION OF THE STATE COURT SHOULD BE HELD TO BE EXCLUSIVE:

(1) A federal Court lacks jurisdiction to authoritatively construe state legislation. U.S. v. 37 Photographs, 402 U.S. 363 (1973). In contrast, a state court is under a constitutional duty to construe state legislation in a constitutional manner. See People ex rel. Busch v. Projection Room Theater, 17 Cal.3d 55, at 56.

(2) State action is efficient; Federal interference promotes judicial inefficiency. Any additional judicial construction by the state courts, including an interpretation that "black" means "white," will be judicially efficient in that it will finally resolve that which now is uncertain and will be binding on the Federal Courts. Kingsley Pictures Corp. v. Regents, 360 U.S. 684 (1959), at 688. The federal

result is different -- see footnote 6 and 7 of Dombrowski v. Pfister, 380 U.S. 479 at 490, and Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981).

(3) The cardinal principle of statutory construction is to save and not to destroy. Tilton v. Richardson, 403 U.S. 677 (1971), at 684.

(4) The question of severability is more properly a matter for the state courts. Metromedia Inc. v. City of San Diego, 453 U.S. 490 (1981), at 521.

III(H). AS THE CUSTODIAN OF PUBLIC MORALS, THE EN BANC APPEALS COURT FOR THE 7TH CIRCUIT HAS VIOLATED ITS CONSTITUTIONAL DUTY TO ARTICULATE THE COMMON LAW (NATURAL LAW) CONSENSUS ON PUBLIC MORALS THAT UNDERPINS OUR JUDEO-CHRISTIAN SOCIETY.

The en banc opinions of Justices Flaum, Cudahy, and Posner are mind-boggling examples of how far the "intellectual" positive law approach, espoused by "modern American jurists," has taken us from our roots in the Common Law tradition (Natural Law) of

England and of our forefathers. What Justices Black and Douglas gave as a reductio ad absurdum, those Justices today hold that the First Amendment commands! See page 21, supra.

Amicus is in complete disagreement with the "positive law conclusions" of the 7th Circuit justices, and urges this court to honor the approach of our Judeo - Christian "tradition" which views the world in which we live as a "great dance," in which the Divine Creator, as the "Dancer," has given mankind His promise that "if you will live in Me, I will live in you." See "Chance or the Dance, A Critique of Modern Secularism," by Thomas Howard, (Ignatius Press, 15 Oakland Ave., Harrison, N.Y. 10528) at pp. 104-108. Howard's book gives a clear description of what has gone wrong with the modern world in its soul. His inquiry: "Is this Chance, or do we Dance?" is a deep and serious discussion about the choice we "moderns" must make,

between a "Fate" driven World controlled by the "Natural Law" and "Fate," in which the dance has already begun without us (so that our only real choice is to join it or reject it) and a "Chance" driven World governed by 7th Circuit Court of Appeals' Justice Posner's "positive law" system - a World which we make for ourselves, and in which there is no ritual dance - only a world in which any action by man [no matter how worthless or heinous under Common Law Traditions] can be transformed into a modern "icon" under the ephemous label "Art." Protection is sought for such conduct under the "sacred talisman" of "Art for Arts' sake." It is a "modern world," in which any meaning, is the meaning we give to it.

In his book, "The Catholic Classics," Dinesh D'Souza explains the following distinction between such "Fate" and "Chance" driven systems, as

drawn by the classical Roman scholar Boethius in his "Consolation of Philosophy" fifteen hundred years ago:

> "If chance is defined as an event without a cause, then there is no such thing as chance, the Muse says. Indeed the ancient philosophers were right about this - nothing can come out of nothing, ex nihilo, nihil. But there is a difference between chance and fate. When a result occurs which was other than the one intended, that's fate.
>
> "Fate, however, is not quite the same thing as providence. According to the Muse, providence is divine reasoning itself; it is the planned order of things, and it is unchanging. Fate is the means by which providence achieves its objectives [through the activities of other "dancers"]; and it seems to change wildly for the individuals. (Our emphasis.)

In this "Great Dance," this Amicus has observed its operation with fascination - just about the time he begins to feel that he is "dancing" his dance by himself - suddenly, and without explanation, "fate" takes over and he finds himself engaged in his dance with other partners who, having recognized the pattern, seen his place, and

assented to it, voluntarily join with him in his "dance."

In Sir Charles Sedleys case, supra, (1663), it was said that the Court is the "custodian" of the public morals, and in James Phelan v. Commonwealth of Virginia, 12 L.Ed.2d 1030 (1850) this Court noted at page 1033:

> "The suppression of nuisances injurious to public health or morality is among the most important duties of government ....
>
> "It is a principle of the Common Law, that the King cannot sanction a nuisance ...."

Justice Posner and the en banc majority have refused to abide by the above "traditions."

In fulfilling this Court's responsibility, Amicus respectfully urges the members of this Court to honor the pattern herein drawn by Sir Charles Sedleys Case and the Common Law Judges as assented to by the early Colonies in America, and join in a majority consensus to reestablish the Common Law principles first ennunciated in Sir

Charles Sedleys case in 1663 as a "natural law" principle which underpins our entire Federal System and will control the disposition of this and other Appeals, which are certain to be addressed to this court in the future in other forms, such as Huffman, Vixen, and Rabe which are discussed hereafter.

Amicus Curiae respectfully submits that this Court, in the past 30 years, has not found it possible, due to the philosophical disagreement of its members and inability to reach a consensus, to carry out its Constitutional duty to resolve, and set to rest the critical moral constitutional questions which underlie and have caused this problem - questions which have been before this Court in a number of forms and for which this Court has acknowledged the need for "judicial decision" by noting its Jurisdiction of such questions.

One of the unanswered question in

this "cutting edge of the law," has been this question, now before this Court, of the broad sovereign right of a state to regulate the public morality of the state. Such was the case in Huffman v. Pursue, Ltd., where the Court, as a whole, avoided the broad 11th Amendment Jurisdictional Question of "subject matter" jurisdiction which had been brought before the Court in the Jurisdictional Statement, and as to which the Court had noted Jurisdiction.

(1). THE "HUFFMAN" APPEAL (CIVIL CASE)

In Huffman, the Prosecuting Attorney filed a civil public nuisance abatement lawsuit under an Ohio statute in a Lima, Ohio, Common Pleas Court, in which it was alleged that during the 11 week period from July 12, through September 25, the defendant had shown 21 obscene motion picture films (2 per week). After trial on the merits, the trial judge on November 30, 1972,

granted a permanent injunction against the exhibition of the public nuisance (the continuous, exclusive exhibition of such obscene films) and ordered the theater closed for a year. Within 2 hours of the entry of the final judgment forfeiting the lease for a period of one year, the theater was closed and the keys seized by law enforcement. The order was a final order which, under Ohio procedures, started the statutory limitation period for filing an appeal. On the next day, December 1, 1972, the first day into the appellate process, Pursue, Ltd., a corporation which was formed by defendants for that purpose, was assigned the property and filed an action in the United States District Court, alleging a Civil Rights Action under 42 U.S.C. section 1983 which collaterally attacked the judgment on "closure" in the Ohio trial court. The federal court on that date (improperly

in Amicus Curiae's view[6]), stayed the closure order and thereafter a 3 judge court was convened which, on April 20, 1973, issued its opinion and order holding the closure under the Ohio public nuisance statute unconstitutional, and enjoining the execution of the closure order. See at Appendix F and G to this Amicus Curiae Brief the Jurisdictional Statement in No. 73-296 at page 13-21, and Subject Index and pages 2-27 of the Petition for Rehearing in No. 73-296. In its opinion on Huffman's direct appeal from the 3 judge Court's action[7], in Huffman v.

6/ The federal court order prevented a final resolution of the question as to whether, under the trial facts, "closure" was a viable remedy which was consistent with the free speech restraints of the federal and state constitution.

7/ The 3-Judge Court safeguard is no longer available to the state, having been repealed by Congress upon the advise and assurance of the Chief

(Footnote Continued)

Pursue, Ltd., 420 U.S. 592, 43 L.Ed.2d 482, 95 S.Ct. 1200, reh. den. 421 U.S. 971, 44 L.Ed.2d 463, 95 S.Ct. 1969 (1975), this Court refused to address the broad "subject matter jurisdiction" question, as to which the Court had noted jurisdiction and, instead, extended the abstention rule for criminal cases in Younger v. Harris, 401 U.S. 37, 27 L.Ed.2d 669, 91 S.Ct. 746 (1971) to civil actions.

In Huffman, supra, Amicus Curiae, as Counsel of Record for Appellant Huffman (and in an unsuccessful Petition for Mandamus), devoted almost one-half hour of oral argument to the broad Jurisdictional Question of "subject matter" jurisdiction which had been brought before the Court, and in which this Court had noted jurisdiction in 415

(Footnote Continued)
Justice that the Huffman ruling would accomplish the same purpose.

U.S. 974, 39 L.Ed.2d 870, 94 S.Ct. 1559 (Mar. 18, 1974). (See "Petition for Rehearing" in the Huffman case at "Subject Index" and "Reasons for Granting a Rehearing" and Jurisdictional Questions 1 and 2 at Appendix pages G2-G26 and G-14 and G-15 to this Amicus Brief. As Counsel for the Appellant in those arguments, Amicus argued without success (to Associate Justice Stewart): (1) that, in view of what was happening throughout this Nation, the jurisdictional question as to "subject matter jurisdiction" was paramount and must be answered even before the Court could get to the Younger abstention issue and whether or not it was to be extended to Civil lawsuits, and (2) that a decision extending Younger abstention in criminal cases to a Civil public nuisance abatement lawsuit would not satisfy the duty of this court to address and decide the "subject matter" Jurisdictional Questions which had been

framed in Huffman. See Reporter's Transcript of the oral arguments on December 10, 1974, in Huffman v. Pursue, Ltd., No. 73-296.

The "Huffman" abstention principle should be reexamined and clarified.

(2). THE "VIXEN" APPEAL (CIVIL CASE)

Such also was the case in the appeal in Film Entited "Vixen" v. Ohio ex rel. Charles H Keating, Jr., 413 U.S. 905, 37 L.Ed.2d 1016 (1973), with respect to this Court's neglect, 17 years ago, to address and resolve the same "public indecency" constitutional question which is now before this Court, when it was squarely brought to this Court on Appeal in the Petition for Rehearing by Appellee Charles H Keating, Jr. in that case. See Appendix E to this Brief.

In the Vixen case the Hamilton County, Ohio (Cincinnati) trial court had enjoined the exhibit of Vixen as an

obscene film and a public nuisance. On the Appeal, and on a Petition for Rehearing, the Ohio Supreme Court refused to rule on the obscenity issue, but instead, in the face of a first amendment challenge, enjoined the exhibition and ordered the excision of the integral acts of indecency throughout the film which were shown on the screen, holding (see Petition for Rehearing in Vixen at Appendix E-9 to this Brief):

> "Neither the First Amendment of the United States Constitution nor the Ohio Constitution will be construed as inhibiting the General Assembly from proscribing the commercial exploitation of a purported act of sexual intercourse ...."

On his Appeal to this Court, Appellant Russ Meyer, the producer of "Vixen," framed Jurisdictional Question 1 in essentially the same form and substance as the Jurisdictional Question which is before this Court:

> "(1) Whether the public exhibition for commercial exploitation of individual scenes depicting on the

> motion picture screen actual or purported acts of sexual intercourse, the cumulative effect of which is a tendency to appeal to prurient interest, can be enjoined by a state court as a public nuisance where such scenes are only a part of the whole motion picture film? (Our emphasis.)

On the Petition for Rehearing, following this Court's refusal to decide that Question on Appeal (See Appendix E at Subject Index and pages E-1 through E-3), this Court would not hear that issue, even though it was, in 1973, the same burning issue that now faced the en banc Court of Appeal below.

The Vixen civil appeal in 71-599 remained on the docket of this court without decision for 20 months, from October 29, 1971 through June 25, 1973. During that period, this Court granted a writ of certiorari in Rabe v. Washington, October Term 1971, No. 71-247, a criminal case, involving the same issue which faces this Court in the civil appeal in Barnes v. Glen Theatre.

(3). THE "RABE" WRIT OF CERTIORARI

(CRIMINAL CASE)

In Rabe v. State of Washington, No. 71-247 the Washington State Supreme Court had affirmed the conviction of a drive-in theater for exhibiting lewd conduct upon the public screens in violation of R.C.W. section 9.68.010 which read in part as follows (see Appendix C-2 to this Amicus Brief):

> "9.68.010 Obscene literature, Shows, etc. Every person who - (1) Having knowledge of the contents thereof shall exhibit ... any ... motion picture film ... picture ... image, or any object or thing which is obscene ... shall be guilty of a gross misdemeanor."

The findings of fact and conclusions of law of the trial judge were as follows (see Appendix C-7 and C-8 to this Amicus Brief):

> "FINDINGS OF FACT
> "I.
> "That on August 25, 1968, through Aug. 29, 1968, the motion picture film 'Carmen Baby' was exhibited at the Park Y Drive-In Theater in Richmond, Benton County, Washington, which was managed by the defendant, William Rabe.
> "II.
> "That said Park Y Drive-In Theater faces a residential area of the

City of Richmond and an overpass providing a clear view of the screen to residents of the area and passing motorists.

"III.

"That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

"IV.

"That passing motorists and residents outside the theater are in a position to see only individual portions or scenes of the movie."

"From the foregoing finding of facts the court makes the following:

"CONCLUSIONS OF LAW

"....

"II.

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theater, those individual scenes become a movies by themselves."

On April 6, 1971, the Supreme Court of the State of Washington affirmed in Washington v. Rabe, 484 P.2d 917, see Appendix C to this Amicus Brief at C-8 and C-9, which considered and rejected the petitioner's argument that this Court's prior rulings precluded an

obscenity conviction where obscene material was exhibited on the public screen at an outdoor motion picture drive-in, which was open to the view of neighborhood residents and audiences on the public highway unless the dominant theme of the motion picture film, taken as a whole, appealed to prurient interest. This Court reversed the criminal conviction on procedural grounds that Rabe had not had fair notice consistent with due process, but said nothing about the real issue therein present, which cried out for resolution in 1972, and avoided addressing that issue in the Civil context, as presented to this Court in the Vixen Appeal.

Thereafter, Appellant Charles H Keating, Jr. and this Amicus Curiae as co-author in a "Brief Amicus Curiae of Charles H Keating, Jr. in Support of Respondents Petition for Rehearing" in the Rabe case (see Appendix C-1 through

C-42 to this Amicus Brief), and in a "Supplemental Brief in Support of Motion to Affirm" in the Vixen appeal (see Appendix C-1 et seq. to this Amicus Brief), requested this Court, without success, to reexamine its decision in Rabe (which reversed the criminal conviction on the procedural point of "notice") and ignored the fundamental Constitutional Question and principles of law which had been expressed by the Supreme Court of Washington in the criminal context and by the Supreme Court of Ohio in the Civil context.

(4). THE MITCHELL BROTHERS SANTA ANA THEATER PETITIONS FOR WRITS OF CERTIORARI (CIVIL CASE).

Such also was the result in Cooper v. Mitchell Brothers' Santa Ana Theatre, 454 U.S. 90, 70 L.Ed.2d 262, 102 S.Ct. 172 (1981), where Amicus Curiae herein, acting as attorney of record for the City of Santa Ana, attempted for 10

years, to resolve the same "closure" constitutional issue which the federal trial court's interference in Huffman v. Pursue, Ltd., in 1972, and the refusal of this Court to act in the Vixen case in 1972, had prevented from being answered in the State of Ohio appellate litigation. The resultant harm to the citizens of Santa Ana was inordinate. See Appendix H to this brief at pages 1-16, containing a copy of a Petition for Rehearing after this Court denied a third petition for writ of certiorari which sought a hearing on the "closure" issue, which this Court in U.S. Marketing, Inc. et al. v. Idaho, 445 U.S. 110 (Jan. 11, 1982) had held constituted a substantial federal question which was ripe for review. When a real estate developer promised to "redevelop" the theater out of existence in a redevelopment project, the City Council, after spending close to $500,000, threw up its hands and

compromised the public nuisance abatement effort by paying the Mitchell Brothers $200,000 for their attorneys' resistance, and permitting them to continue their operations.

CONCLUSION

For all of the foregoing reasons, Plaintiffs' Civil Rights Action should be dismissed for lack of subject matter jurisdiction and for failure to state a claim (subject matter) upon which relief can be given.

Irrespective of whether or not a state case is pending, jurisdiction to interpret and apply the meaning and scope of a state statute involving an important state interest (the right to control public indecency under the police power) which is constitutionally valid on its face, to specific activity of Plaintiffs, is exclusively in the state courts pursuant to the 11th Amendment, and, in entertaining a civil

rights action which challenges such application, a federal court's jurisdiction is limited to "jurisdiction to determine jurisdiction," and if it determines that the Plaintiffs' activity is "conduct" and is not "speech" under the First Amendment as a matter of law, it must dismiss the federal civil rights action for lack of "subject matter" jurisdiction and failure to state a claim upon which relief can be granted or order that the civil complaint be filed in the State Court.

Dated: December 4, 1990

Respectfully Submitted,

JAMES J. CLANCY
Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 1990, the original and 40 copies of the within Amicus Curiae Brief were deposited in the United States Post Office in Van Nuys, California with first-class postage prepaid, and properly addressed to the Clerk of the United States Supreme Court.

I further certify that three (3) copies were also mailed, postage prepaid, to the below listed parties to the proceedings and that all parties required to be served have been served:

Charles A. Asher
205 W. Jefferson
South Bend, Indiana
Counsel of Record for Respondents

Wayne E. Uhl
Deputy Attorney General
219 State House
Indianapolis, Indiana 46204
Counsel of Record for Petitioners

Dated: December 22, 1990

James J. Clancy